151 U.S. 447
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RECORD, CASE No. 14,150.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 181.

THE MAMMOTH MINING COMPANY, APPELLANT,

vs.

THE SALT LAKE FOUNDRY AND MACHINE COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED SEPTEMBER 16, 1890.

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a File No. 62.

In the Supreme Court of Utah Territory.

SALT LAKE FOUNDRY AND MACHINE COMPANY, Plaintiff and Respondent,
vs.
THE MAMMOTH MINING COMPANY *et al.*, Defendants and Appellants.

Transcript of Record.

Appeal from first district court of Utah, J. W. Judd, judge.

Arthur Brown, E. B. Critchlow, attorneys for respondent; Bennett and Bradley, J. G. Sutherland, attorneys for appellants.

Marked: Filed in the office of clerk supreme court of Utah, Nov. 23, 1889.

JOS. P. BACHE, *Clerk.*

1 In the District Court for the First Judicial District of Utah Territory.

GEORGE W. TAYLOR *et al.*, Plaintiffs,
vs.
THE MAMMOTH MINING COMPANY *et al.*, Defendants.

Complaint.

Now comes the defendant, Salt Lake Foundry and Machi' Company, by its attorney, and answers the said complaint and s ys that as to the allegations contained in said complaint relative to the amount of the time and the amount of the goods furnished to the defendant, The Mammoth Mining Company, by plaintiffs, the steps taken to perfect this lien, and all the other allegation- of said complaint it has no knowledge, information, or belief sufficient to enable it to answer any or either of said allegations or any or either of the allegations in the complaint contained, and therefore denies each and every of said allegations.

Defendant, further answering, and by way of cross-complaint, states:

That it, the said Salt Lake Foundry and Machine Company, is a corporation existing and duly organized under and by virtue of the laws of this Territory.

That it is, and has been at the times hereinafter stated, carrying on the business of a foundry and machine shop at Salt Lake City, Utah Territory.

That on the — day of January, 1883, the said defendant, con-

tracted with the said defendant, The Mammoth Mining Com-
2 pany, through its agents, to furnish the said company, castings, construct and repair machinery, at current prices, and do other work within the said machine company's business, all of which was to be used, and was used by the said mining company in the erection and construction of the refineries, mills, brick kilns and smelters of said defendant, The Mammoth Mining Company, which said refineries, mills, brick kilns and smelters were situated upon the southeast quarter of the northeast quarter of the southeast quarter of section twenty-one, and the northwest quarter of section twenty-two, in township eleven, south of range three west of Salt Lake merid-an, in Juab county, Utah Territory, lying and being near the line of the Salt Lake and Western railway.

That in pursuance of said contract, the said Salt Lake Foundry and Machine Company, from time to time, from the said — day of January, 1883, until the 26th day of March, 1883, furnished castings, made and repaired machinery, worked for and furnished materials to the said defendant, The Mammoth Mining Company, to be used in the constructions above stated, at the request of the said mining company.

That the value of the total so furnished was three thousand six hundred and 6 $\frac{4}{100}$ dollars, at the prices agreed upon between the said Mammoth Mining Company and this defendant, upon which said machine company received payment of five hundred dollars, leaving a balance due it of three thousand one hundred and 6 $\frac{4}{100}$ dollars.

That no part of the same has been paid, and the whole thereof now remains due and payable, together with interest known at current rates, from the said 26th day of March, 1883.

That on the 27th day of March, 1883, the said machine company, caused to be recorded in the office of the recorder of Juab county, Utah, this claim for a lien, of which Exhibit No. 1, hereto attached and made a part thereof, is a copy, and that the costs of recording the same was one dollar.

Therefore, the defendant, The Salt Lake Foundry and Machine Company, prays that this lien on said property may be established to the amount aforesaid, and that they may recover their costs of this suit.

R. B. TRIPP,
Attorney for Salt Lake Foundry & Machine Co.

3 TERRITORY OF UTAH, }
County of Salt Lake, } *ss:*

Thomas Pierpont being duly sworn says:

I am superintendent of the defendant, Salt Lake Foundry and Machine Company, a corporation, and have been during the times herein mentioned. I have heard this answer read, and know the contents thereof, and the same is true of my own knowledge, except matters therein stated on information and belief, and as to those, I believe it to be true.

T. PIERPONT.

Subscribed and sworn to before me this 8th day of October, 1883.
[SEAL.] A. H. WINN,
Notary Public.

EXHIBIT No. 1.

TERRITORY OF UTAH, } ss:
County of Juab, }

Notice is hereby given that the undersigned, the Salt Lake Foundry & Machine Co., of Salt Lake City, Utah, has, and intends to hold a lien upon that certain mining property, including the mine or mines situated in Tintic mining district, Juab Co. U. T. The property upon which the lien is claimed more particularly, consists of the Mammoth smelters, quartz mill, refining and smelting furnaces, brick kilns, brick press, pug mill and other improvements on said mining property of the Mammoth Mining Co., and H. A. Monroe, Butler Johnstone, situated in Utah Territory, and upon the land on which said property is situated for the amount of three thousand one hundred and 6 $\frac{4}{100}$ dollars, and interest thereon at the rate of ten per cent. per annum, from March 26, 1883, till paid, which said sum and interest is now due from the Mammoth Mining Company and said Johnstone, to said Salt Lake Foundry and Machine Company, for work done and materials furnished on
4 the said smelters, quartz mill, refining furnaces, and other property above described in its capacity of a foundry and general machine shop, at the request of the said mining company, through its authorized agents and the said Johnstone, and within three months next preceding this notice.

That said improvements upon which a lien is claimed *and* known as the Mammoth mill furnaces, situated in section 21 and 22 in township 11, S. R. 3 west, Juab county, U. T. near the line of the Salt Lake & Western railway at Tintic Station.

Dated March 27, 1883.

SALT LAKE FOUNDRY & MACHINE COMPANY,
By R. B. TRIPP, *Its Attorney.*

Witness:
ALMA HAGUE.

Endorsed: Filed for record this 27th day of March 1883 at 12.30 p. m. Alma Hague, recorder Juab county, Utah. Recorded March 28, 1883 at 10 a. m. in Book No. 12, page 17. Alma Hague, recorder Juab county, Utah Territory. (Filed this 12th day of October, 1883.)

5 (Title of Court and Cause.)

Answer.

The defendant, The Mammoth Mining Company, answering the cross-complaint of the Salt Lake Foundry and Machine Company:

Denies that at any time in January 1883, or at any time, the said

defendant, The Salt Lake Foundry and Machine Company contracted with this defendant, through this defendant's agents or otherwise, to furnish this defendant any castings, or to construct or repair any machinery, at current prices, or at any prices, or to do any work, or furnish any material to be used by this defendant or which was used by this defendant in the erection or construction of any refinery, mill, brick kiln or smelters, or which this defendant used in any way or for any purpose. And this defendant denies that it made any contract with the said Salt Lake Foundry and Machine Company in respect to or concerning any of the matters stated in said cross-complaint, or that during any of the times alleged in the cross-complaint, this defendant was erecting or constructing any refinery, mill, brick kiln or smelter situated on the land described in said cross-complaint or elsewhere.

And this defendant denies that, in pursuance of the contract alleged in said cross-complaint, or any contract, or in any way, the defendant, The Salt Lake Foundry and Machine Company from time to time from January 1883, until the 26th day of February, 1883, or at any time furnished this defendant any castings or made or repaired any machinery for this defendant, or worked for, or furnished any materials to this defendant, or that this defendant requested the performance of any work or the delivery of any material, or received or in any way used any material. And this defendant denies that the said Salt Lake Foundry and Machine Company did work for or furnished material to this defendant of the value of three thousand six hundred and 6 $\frac{4}{100}$ dollars or of any value, at prices agreed or otherwise, or that there is a balance due to said defendant of three thousand one hundred and 6 $\frac{4}{100}$ dollars, or of any sum or amount, or that there is due any interest on any sum or amount. This defendant, therefore, prays judgment
6 that said cross-complaint be dismissed, and that this defendant recover the costs of said action.

BENNETT, HARKNESS & KIRKPATRICK,
Attorneys for the Defendant, Mammoth Mining Company.

TERRITORY OF UTAH, }
Salt Lake County, } *ss:*

James A. Cunningham being duly sworn says, I am an officer to wit: The president of the Mammoth Mining Company; that the foregoing answer of said company to the cross-complaint of the Salt Lake Foundry and Machine Company, is true of my own knowledge, except as to the matters therein stated on information and belief, and as to those matters, I believe it to be true.

J. A. CUNNINGHAM.

Subscribed and sworn to before me, October 13, 1883.

[SEAL.] E. T. SPRAGUE,
Clerk of Supreme Court of Utah Territory.

(Filed this 16th day of October, A. D. 1883.)

7 (Title of Court and Cause.)

Findings of Facts and Conclusions of Law.

This cause having come on regularly to be heard before the court on the 2nd day of December, A. D. 1888, upon the cross-complaint of the Salt Lake Foundry and Machine Company, and the answer of the Mammoth Mining Company thereto, Arthur Brown, Esq. appearing for the said plaintiff, and Messrs. Bennett & Bradley and J. G. Sutherland, Esq., appearing for the defendant, The Mammoth Mining Company, and testimony having been introduced by the parties and argument having been had thereon by council and the court, being fully advised in the premises, now makes the following

Finding of Facts.

1. That at all the times hereinafter stated the said Salt Lake Foundry and Machine Company and the said Mammoth Mining Company were corporations, organized and existing under the laws of Utah Territory.

2. That on the — day of January, A. D. 1883, the said Salt Lake Foundry and Machine Company contracted with the said Mammoth Mining Company, through its agents, to furnish to said Mammoth Mining Company castings, to construct and repair machinery at current prices, and to do other work within the scope of said machine company's business, all of which was to be used and was used by the said mining company in the erection and construction of the refineries, mills, brick kilns and smelters of the said defendant mining company, which said refineries, mills, brick kilns and smelters were situate upon the southeast quarter of the northeast quarter of the southeast quarter of section twenty-one (21) and the northwest quarter of section twenty-two (22) in township eleven (11) south of range three (3) west of Salt Lake meridian in Juab county, Utah.

3. That in pursuance of said contract, the said foundry & machine company from time to time from said — day of January, A. D. 1883, until the 26th day of March A. D., 1883, furnished castings, made and repaired machinery, worked for and furnished material to the said Mammoth Mining Company to be used in the construction of the buildings, etc., above referred to at the special instance and request of said company.

8 4. That the total value of the materials furnished, and work done so as aforesaid was thirty-six hundred and six and $\frac{4}{100}$ dollars at the prices agreed upon between the said mining company and the said foundry and machine company.

5. That no part of said sum has been paid excepting the sum of five hundred (500) dollars and the balance thereof to wit the sum of $3,106.04 *dollars* remains due and unpaid, together with interest thereon at the rate of ten (10) per cent. per annum from the said 26th day of March, A. D. 1883.

6. That on the 27th day of March, A. D. 1883, the said Salt Lake

Foundry and Machine Company caused to be recorded in the office of the county recorder of Juab county, Utah, their claim for a lien on the premises above described, containing a statement of its demand after deducting all just credits and offsets, with the name of the owner to wit the said Mammoth Mining Company, and a statement of the time given, terms and conditions of the contract and a description of the premises sought to be charged with the lien, the facts stated in said notice of lien being in all respects the facts set forth in the foregoing findings of facts.

7. That this action was brought to foreclose said lien within the time allowed by law for that purpose.

From the above findings of facts the court finds the following

Conclusions of Law.

1. That the said Salt Lake Foundry and Machine Company is entitled to a judgment against the said Mammoth Mining Company in the sum of three thousand one hundred and six and $\frac{4}{100}$ ($3,106.04) dollars with interest thereon, from March 26, 1883, at the rate of ten per cent. per annum, amounting in all to the sum of five thousand and eleven and $\frac{54}{100}$ ($5,011.54) dollars, and for costs of this suit and that execution issue therefor.

2. That said Salt Lake Foundry and Machine Company is also entitled to a decree establishing the said judgment as a lien upon the premises mentioned in the complaint and the findings heretofore filed, and foreclosing the same according to the law and practice of this court.

J. W. JUDD, *Judge.*

Dated May 15, 1889.

(Filed May 16, 1889.)

9 (Title of Court and Cause.)

Decree.

This cause having come on regularly to be heard on the 2nd day of December, A. D. 1888, Arthur Brown, Esq., appearing for the plaintiff in the cross-complaint, The Salt Lake Foundry and Machine Company, and Messrs. Bennett & Bradley and J. G. Sutherland appearing for the defendant, The Mammoth Mining Company, and the court, having heard the testimony and determined the issues and having made and filed its findings of fact and conclusions of law.

It is now, therefore ordered adjudged and decreed:

First. That the plaintiff, The Salt Lake Foundry & Machine Company do have and recover of the Mammoth Mining Company the sum of three thousand one hundred and six and $\frac{4}{100}$ dollars, together with interest thereon at the rate of ten (10) per cent. per annum from the 26th day of March, A. D. 1883, amounting in all to the sum of five thousand and eleven and $\frac{54}{100}$ dollars, together

with costs of this action taxed at $288.35, which sum is a valid lien upon the premises in the complaint and hereinafter mentioned.

Second. It is further adjudged and decreed that all, and singular the premises hereinafter described or so much thereof, as may be sufficient to raise the amount due to the plaintiff, The Salt Lake Foundry and Machine Company for said sum of $5,011.54 and costs of this suit, taxed at the sum of $288.35 and expenses of sale, and which may be sold separately without material injury to the parties interested be sold at public sale by the United States marshal for Utah Territory in the manner prescribed by law, and according to the practice of this court, and that the marshal after the time allowed by law for the redemption has expired, execute a deed to the purchaser or purchasers of the premises on said sale.

That the marshal, out of the proceeds of said sale, retain his fees, disbursements and commissions on said sale, and pay to the Salt Lake Foundry and Machine Company, or its attorney, out of said proceeds, the sum of two hundred and eighty-eight and $\frac{35}{100}$ dollars, costs of this suit. Also pay to the plaintiff the further sum of five thousand and eleven and $\frac{54}{100}$ dollars, the amount so found due as aforesaid, together with the interest thereon at the rate of ten per cent. per annum from the date of this decree, or so much thereof as the said proceeds will pay. That the said Mammoth Mining Company and all persons claiming or to claim under it, and all persons having liens by judgment or decree subsequent to said lien mentioned in the complaint herein upon the lands hereinafter described, and their personal representatives be forever barred and foreclosed of and from all equity of redemption and claim of in and to said premises, and every part and parcel thereof, from and after the delivery of the said marshal's deed. And it is further adjudged and decreed that the purchaser, or purchasers of such premises at such sale be let into the possession thereof, and that any of the parties to this action who may be in possession of said premises, or any part thereof, and any person who since the commencement of this action, has come into possession under them or either of them, deliver possession thereof to such purchaser or purchasers on production of the marshal's deed for such premises or any part thereof.

And it is further adjudged and decreed that if the moneys arising from the said sale shall be insufficient to pay the amount so found due to the said Salt Lake Foundry and Machine Company as above stated, with interest and costs and expenses of sale as aforesaid, the U. S. marshal shall specify the amount of such deficiency and balance due to said foundry and machine company in his return of said sale, and that on the coming in of said return, the clerk of this court, docket a judgment for such balance against the said Mammoth Mining Company, and that the said Mammoth Mining Company pay to the said foundry and machine company the amount of such deficiency and judgment, with interest thereon at the rate of ten per cent. per annum, from the date of said last-mentioned return and judgment, and that the said foundry and machine company have execution therefor. The lands and prem-

ises directed to be sold by this decree, are situated, lying and being in the county of Juab, Territory of Utah, and particularly described as follows, to wit:

The southeast quarter of the northeast quarter of the southeast quarter of section twenty-one (21) and the northwest quarter of section twenty-two (22) in township eleven (11) south of range three (3) west of the Salt Lake meridian, in Juab county, Utah Territory,
lying and being near the line of the Salt Lake & Western
11 railway, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.

Done in open court this 15th day of May, A. D. 1889.

J. W. JUDD,
Judge of District Court.

(Filed May 16, 1889.)

(Title of Court and Cause.)

Statement on Motion for New Trial and on Appeal from Judgment.

This cause was had before Hon. J. W. Judd, at Provo City, Utah, commencing December 2, 1888.

FRED. J. CORKER, sworn for plaintiff.

By Mr. BROWN:

Q. What is your business?
A. Real-estate agent, Salt Lake City.
Q. Do you know the Mammoth Mining Company?
A. Yes, sir.
Q. Doing business as a corporation?
A. Yes, sir.
Q. Was it in January, 1882?
A. Yes, sir.
Q. Did you hold any office in that company?
A. Secretary.
Q. How long?
A. Since June, 1884.
Q. Who was secretary in 1882?
A. I can refer to the minutes of the company.
Q. Have you the minutes of the meetings for the election of the directors and stockholders?
A. Yes, sir.
Q. Turn to the meeting—what is the date of the meeting of the directors and officers?
A. Tuesday, January 5, 1884; first Tuesday in January every year.
Q. Now look——
A. Stockholders' meeting was Tuesday, February 7, 1882.
12 Q. Who was elected directors and officers?

COURT: What is the dates between which your goods were furnished?

BROWN: Between December, 1882, and the succeeding September.

Q. First meeting February, 1882?

A. Yes, sir.

The directors elected—Samuel McIntyre, William McIntyre, J. A. Cunningham, Edward Austin and W. H. H. Bowers.

Q. Who were the officers elected by the directors and stockholders?

A. James Cunningham and W. H. H. Bowers. Bowers, secretary; and Cunningham, president.

Q. Was there any change made in the offices of directors in 1882?

A. No, sir, none.

Q. No change made in either during that year?

A. No, sir.

Q. When was the next meeting?

A. Tuesday, February 6, 1883.

Q. Who was then elected directors and who officers?

A. Samuel McIntyre and William McIntyre, James Cunningham and William Green and Edward Austin.

Q. Same directors, except that Green took the place of Bowers?

A. Yes, sir.

Q. Who were elected officers by the directors?

A. J. A. Cunningham, president for the ensuing year; William McIntyre, vice-president; and Mr. Samuel McIntyre, treasurer; and Charles G. Selwin, secretary.

Q. Was there any change in these offices prior to June, 1883, any time prior to July, 1883?

A. Find from June 8, 1883, when Mr. Samuel McIntyre was chosen president, for the purpose of working and operating the mines.

Q. No other change?

A. No, sir.

DAVID STRINGER, sworn for plaintiff.

By Mr. BROWN:

Q. Where do you reside?

A. Spanish Fork.

Q. Did you ever know this Mammoth Mining Company?

A. Yes, sir.

13 Q. Were you called at one time to work upon their premises?

A. Yes, sir.

Q. When was it that you commenced work?

A. July 1, or 2, 1882.

Q. How long did you remain at work on those premises?

A. Well, I stayed there until about June 8, 1883, I think it was

Q. What business were you in?

A. I was engaged as superintendent of the concentrating department.

Q. What was the work going on?
A. Copper matte, concentrating of the ore.
Q. Was there any construction of buildings going on?
A. There was when I went there first; there was some furnaces being prepared.
Q. How long was the work of constructing going on?
A. It was going on when I first went there.
Q. How long about?
A. That is, there was a kind of a rest. Quit when I began.
Q. Until what time?
A. Think it was up to about March.
Q. What was being constructed?
A. Furnaces.
Q. What else?
A. There was a brick yard for fire-brick, a refinery, smelting furnaces; I don't know that I could enumerate all.
Q. Did you at that time know the officers of this company, or directors, the McIntyres, Cunningham or Bowers?
A. I knew Mr. Cunningham to be the president, and Mr. Bowers to be the manager, and Mr. Selwin and William McIntyre as directors.
Q. How far from this work did Samuel McIntyre live?
A. I don't know—I don't think it was more than two hundred yards.
Q. How frequently was he to the premises during your stay there?
A. Well, I don't know that I could remember that, but I should say about three times a week.
Q. Was he the mining superintendent at that time?
A. The other one—he was one of the directors.
14 Q. Where did Mr. William McIntyre live?
A. Somewhere below—I cannot tell you—not far off.
Q. How often was he around there?
A. Generally he would be around when we were shipping matte.
Q. What is the copper matte?
A. It is an ore concentrated.
Q. The ore had been taken from the mines, and there concentrated into matte?
A. Yes, sir.
Q. Were you shipping matte while William McIntyre was there?
A. Yes, sir.
Q. How often did you see Mr. Cunningham the president there?
A. When I went there, and during the time of the construction, he spent nearly the whole of his time there.
Q. What time was that?
A. In the fall of 1882.
Q. Spent nearly all his time there?
A. Pretty near—could not give the exact days, so far back.
Q. Who employed you to go there?
A. The manager, Mr. Bowers employed me.
Q. Mr. Bowers?
A. Mr. Bowers.

Q. How much of the time was Mr. Bowers there?
A. Well, he would make weekly visits—somewhere about there.
Q. Do you know where his residence was?
A. In Salt Lake City.
Q. From there he would reach those employed?
A. Would come down right to the works there.
Q. Came down once a week?
A. Yes, sir.
Q. This was in the fall of 1882?
A. Yes, sir.
COURT: Who was Bowers?
A. Superintendent. Manager, he used to be.
Q. What was Mr. Cunningham doing there during the time you say he was there; was he much about the construction of the building?
A. For the house in which the new furnaces was to be built.
Q. What was he doing?
A. Superintending the construction.
Q. Do you remember seeing him at any time, at the time the men were paid off?
A. He has paid the men once or twice when I saw him, during all my career there.
Q. Ask you how many men were employed about the smelting works, construction and all?
A. How big a force?
Q. At the time Cunningham was superintendent?
A. The first time I went there I should say there was from seventy to eighty men around there. But as to the last time, when the construction was going on in full force, I don't know that I could give you the number.
Q. It was a large number?
A. Of miners, masons and laborers. He had a boarding-house there that would seat one hundred men. I don't know that they could all sit at it.
Q. You say he paid off the men once or twice?
A. Yes, sir.
Q. Did anybody assist Bowers in his duties afterwards? Who took his place?
A. Mr. Butler Johnstone.
Q. What time did Butler Johnstone come?
A. I cannot say exactly whether it was the end of November or the beginning of December, it may be something that way.
Q. How long did he remain?
A. He remained until away in the spring I think.
Q. What duties was he performing at that time?
A. Well, he seemed to me to be performing about the same duties that Bowers had been.
Q. Well, what I want to know — what you saw him do?
A. Performing about the same duties that Bowers was.
Q. Manager and superintendent?

A. Yes, sir.

Q. What time did you say he left, if at all?

A. I think the last I saw him about the furnaces in Tintic, was in February or March.

16 Q. After that who performed the duties of manager or superintendent?

A. There was a person by the name of William Plummer, I think.

Q. How long did he act as superintendent of the Mammoth works?

A. He stayed there until about October.

Q. The eighth of June—was the work quit at that time?

A. Oh, yes, that was the time that Mr. Samuel McIntyre brought down the contract and read to the men there.

Q. The contract was read on the 8th of June to the men?

A. Shown the men.

COURT: What date was that?

A. 8th of June, 1883.

BROWN: Prior to this 8th of June, during the time that Butler Johnstone was managing and superintending, how often was Cunningham there?

A. During the time of Johnstone's administration?

Q. Yes, sir.

A. He was there often.

Q. During Bowers' administration, how often was he there? How often during Plummer's administration was Cunningham there?

A. Quite a number of times; seemed to be there very frequently.

Q. When Butler Johnstone was managing, how often did you see Samuel McIntyre?

A. Quite a number of times.

Q. What were your duties?

A. I superintended the smelting and concentrations. Mr. Cunningham came and told me that I was to superintend the construction of the furnaces. That is, that they were to be built according to my model of smelting furnaces; I had that part of the business. The dimensions of the furnaces—they were built according to my plans.

Q. In reference to your duties, did you have orders to order material?

A. Yes, sir, I have ordered material.

Q. Did you have orders to order material from this plaintiff, the foundry company?

A. I believe I did.

17 Q. Did you talk with Mr. Cunningham about ordering material at the time?

A. Mr. Cunningham was to order the material; he told me to order the material that I wanted in this business; something like that, if I recollect it. I suppose I did order materials. I know of one instance, I was up to the foundry and selected patterns to be worked for the construction of cupola furnaces for refining silver.

Q. These patterns were sent to the foundry?

A. Yes, sir, I went up there personally and selected the patterns out.

Q. They were patterns for cupola furnaces, were they?

A. They had been used at the Germania.

Q. When were those cupola furnaces furnished? When ordering these cupola furnaces, for whom did you tell the foundry manager they were to be?

A. Well, I don't recollect whether I mentioned that they were for any particular person; considered that they knew me.

Q. Don't remember whether you ordered for the Mammoth Mining Company?

A. I understand I was, but whether I am sure of the words, I cannot say.

Q. Do you know to whom the order were shipped?

A. They were shipped, the goods.

Q. Do you know to whom they were to ship the goods?

A. No, sir, I supposed it was the Mammoth Mining Company.

Q. I show you a printed notice; I ask you to look at it; have you ever seen such a notice as that before?

A. Yes, sir.

Q. Whereabouts did you see it?

A. Stuck up in the hoisting-house.

Q. At what time were they stuck up?

A. It was at the time of Johnstone's administration. It was in September to February. He went there the last of November, 1882, and stayed until February, 1883—if I recollect right—in January, 6th day of January.

Q. Whereabouts in the works were they stuck?

A. One of them stuck inside the office when the men came in. There was one there stuck one side of the door, in the furnace-house.

Q. Where else?

18 A. I don't know, they were pretty well distributed around the works.

Q. In plain sight?

A. I didn't say they were.

BROWN: I offer that in evidence.

COURT: Do you wish to offer it at this point?

BENNETT: I object to this.

Signed W. H. H. Bowers and Butler Johnstone.
Notice read.

SUTHERLAND: I wish to make an objection; the objection is as follows: I object that these parties were working under a contract; we object to any evidence of the use by them of the name of the company, unless notice was brought home to the plaintiff prior to the time when they were induced to give credit to the defendant company.

COURT: That it was brought home to the defendants and the plaintiff's company?

SUTHERLAND: Yes, sir. It should be shown that notice of this paper was brought home to the plaintiff, and also to the defendants. They, defendants, cannot be charged on account of the use of its name, of whom they were not cognizant of it.

Overruled. Exception.
(Marked Exhibit "1.") It was a schedule of rules regulating the duties and conduct of the men employed.

Q. Was there any rules posted up?
A. Yes, sir.
Q. Publicly, also?
A. Yes, sir.
Q. Whereabouts were they posted?
A. Some posted. Number of them posted around.

BROWN: I shall read the document.
WITNESS: I have seen one.
BROWN: I will read this.
BENNETT: Same objection. Is it subject to the same exception as before?

(Brown reads all the notice.)
Dated January 1st.
Pay-rolls with heading—see Exhibits 5, 6, 7.
Regulations affixed.
(Marked Exhibit- "2" & "3.")

19 Q. Do you remember the pay-rolls being introduced in the trial of Elias Morris against the Mammoth Mining Company?
A. I do; yes, sir.
Q. So you have seen them before?
A. Yes, sir.
BROWN: I have asked the gentleman to produce the pay-rolls; has produced four. I will open one of them and show it to you Mr. Stringer. I will ask you if you recognize that as the form in use?
A. Yes, sir, that is the form.
COURT: What is the date of that?
A. March 31, 1882.
BROWN: I offer these four.

Same objection. Ruling and exception.

BROWN: This is for June, 1882.

Q. I ask you if this same form was used afterwards?
A. Yes, sir.

COUNSEL FOR DEFENDANT: We object to those pay-rolls here, on the ground that they were not used during the period in question.

Q. I ask you if the same form was used from the months of December 1882, January, February and March, 1883?

Objected to.

BROWN: In the trial of the case of Morris *vs.* The Mammoth Mining Company, we had a large number of papers of various kinds, among them the pay-rolls, and most of them were procured from Mr. Cunningham, but he procured them from divers sources; had them on hand when that suit was finally disposed of. As a part of the arrangement of that suit, Mr. Morris was to turn over to the Mammoth Mining Company, or Mr. Cunningham, all of the papers that belong to him. Among the papers turned over were the pay-rolls, I think down to April, 1883. A large number of papers were turned over.

BENNETT: Have you searched your office for the pay-rolls?

A. Yes, sir.

BROWN: Now I understand my brothers to say that these are all that they can find?

BENNETT: That is all we can find.

Q. Now, I will ask you if the pay-rolls for the succeeding months, January, February, March, April, 1883, were in the same form—same heading?

Objected to. Overruled. Exception.

20 Q. Same form?

A. Yes, sir.

Q. State whether while Mr. Cunningham was attending to the pay-rolls, whether the same form was there used.

A. Yes, sir.

Q. The same pay-rolls—the same heading?

A. Yes, sir.

Q. He paid off the men there on one or two occasions during the time you were there?

A. Yes, sir.

Q. He was down there, brought money too, and paid off the men?

A. Some of them.

Pay-rolls marked Exhibit- 4, 5, 6 & 7, with heading of Mammoth Mining Co.

(Exhibiting paper.)

Q. Have you ever seen that before?

A. Yes, sir.

—. ——?

A. They were hung up by Mr. Johnstone.

Q. Private place?

A. Yes, sir.

Q. Did Cunningham and those directors come in there where they were?

A. Yes, sir.

Q. Came into the office?

A. Yes, sir.

Objection.

(Reads heading.)

Marked Exhibit "8."

Q. Was there stationery furnished there?
A. Yes, sir.
Q. Was it in use there?
A. Yes, sir.
Q. I ask you if you used that form?
A. Yes, sir.
Q. Whose handwriting is signed to it?
A. I don't know exactly. I think it must be the clerk's writing. I know the signature of W. H. H. Bowers. That is Bowers' signature.
Q. Do you know the handwriting of the other directors?
A. Yes, sir.
Q. You know their handwriting?
21 A. Yes, sir.

BROWN: I offer this letter.

Same objection.
(Letter read.)
(Marked Exhibit "9.")

Q. Whose handwriting is this document I now show you?
A. That is my own.
Q. Did you keep a letter-press copies of the letters?
A. Yes, sir.
Q. It is directed to Mr. Cunningham?
A. Yes, sir.
COURT: Is that the Cunningham, president of the company?
A. Yes, sir.

Objected to because not the original.

BENNETT: We object on the further ground that we have not had any notice to produce the original, and it don't purport to be the act of the Mammoth Mining Company—headed Mammoth smelting works, signed by Stringer, superintendent.

Objection overruled. Exception.
(Letter read.)
A notice to produce papers was served. Copy annexed thereto marked notice.

Q. What date is that?
A. December 4, 1882.
Q. Did the things come in pursuance to the order then sent?
A. Did not all come.
Q. Can you tell what?
A. I spoke to Mr. Cunningham about not all of them having come, and he said he had ordered them.
Q. He checked off what was ordered?
A. Yes, sir.
Q. These checks were made by him?
A. Yes, sir.
Q. On this press copy?
A. Yes, sir.

Q. Do you know whether they came from the plaintiff or not?
A. I don't recollect.
22 COURT: What has that to do with the Mammoth Smelting Co.?
A. When I was at the smelting works, I addressed my letters from the smelting works.
Q. Were these smelting works a part of the construction going on?
A. Yes, sir. I had the construction of the furnaces?

(Letters marked Exhibit "10.")

Q. I will show you another one. Whose handwriting is that?
A. That is my own.
Q. Addressed to the same person?
A. Yes, sir.

BROWN: I offer that in evidence.

Same objection. Same ruling. Exception.

Q. I show you what purports to be a stub book. Have you ever seen that stub book before?
A. Yes, sir.
Q. Whose handwriting is that stub book in?
A. McNorton's.
Q. Who was McNorton?
A. He was working at that time on the works, and made out the pay-rolls.
Q. Was McNorton at work?
A. He was occupying the office of the superintendent, just about three hundred yards from the works.
Q. What was the general nature of his duties?
A. His duties were to keep account of them—take the time of the men.

BROWN: I offer it in evidence.
SUTHERLAND: We object to this evidence. It is offered as a stub book; that is a memorandum of the substance of a paper torn off from the stub book, is incompetent.

Q. Is it in the name of this company?
A. No, sir.

SUTHERLAND: Further objection is, that this witness did not keep these books——
BROWN: My object in offering it was to show how the business was being conducted.

(First letter read.) Ex. 11 like Ex. 10.

COURT: This is payable December 15, payable at M. M. Co.'s office?
23 WITNESS: Yes, sir, that is where the men went to get their money.

Q. Was there any other Mammoth Mining Company doing business there except this company?
A. No, sir.

(Marked Exhibit "12." Book of stubs. Heading of each: "Mammoth smelter, payable at M. M. Co. office.")

Q. Did you know Mr. Plummer's handwriting?
A. Yes, sir. That is Plummer's handwriting.

SUTHERLAND: We object; as not purporting to be a paper emanating from the defendant.
COURT: Read it subject to this objection. Exception.

BENNETT: What date is that?
A. March 19, 1883.

(Exhibit "13.")

COURT: How do you reconcile that statement; that was William Plummer succeeding Johnstone.
A. It was John W. Plummer—it is John William——
—. ——?
A. I think it is the same name.
Q. Is that his signature? That is your signature is it not?
A. I think once or twice Jacobs did some writing for me.
Q. Do you say that is one?
A. I don't recollect. On one or two occasions Mr. Jacobs ordered for me. It does not seem to be my writing.
Q. You can't say whether this went out from the office or not?
A. No, sir.
Q. There was a man by the name of Nelson there?
A. Yes, sir. John Nelson.
Q. Did he make any orders for you?
A. I think that is Nelson's and not Jacob's.

(Marked Exhibit "14.") Date, January 29, 1883. "Mammoth smelting works."

BROWN: Whose handwriting is this one?
A. This is Plummer's signature.

SUTHERLAND: We object to this, as it does not purport to emanate from the defendant.
COURT: Read it subject to that objection. Exception.

(Marked Exhibit "15.")

Q. This was for these same works?
A. Yes, sir, the refinery department.
24 Q. Same ground?
A. Near by. On the company's ground.

Same objection.
(Paper read. Marked Exhibit "16.")

SUTHERLAND: I call your honor's attention to the fact that these three papers do not emanate from the defendant.

Q. Who was Mr. Pussey?
A. Mr. Pussey was there before I was there.
Q. What was his duties?
A. Looking after things generally.
Q. By the way you spoke of a refinery?
A. Yes, sir.
Q. Do you know about the erection of the refinery?
A. Yes, sir. First of all it was suggested that the refinery should be built.
Q. Who was there?
A. Butler Johnstone, Mr. Samuel McIntyre.
Q. Any one else?
A. I think Mr. Bowers and Plummer were there.
Q. State what occurred.
A. I was not there, but saw them maybe fifty or ten yards off.
Q. How did you know what they were doing?
A. Told me—I had been up before that with Johnstone.
Q. I shall show you another one from Plummer; is that Plummer's handwriting?
A. Yes, sir.

Sutherland object- to this on the same ground; offers orders of the plaintiff that do not purport to come from the defendant company. Overruled. Exception.

(Letter read.) Marked Exhibit "17."

Q. Who was this one sent to?
A. Pierpont, the superintendent of the foundry at that time.
Q. Is this another one of the same?
A. Yes, sir.
Q. Same handwriting?
A. Yes, sir.
Q. Same signature?
A. Yes, sir.

SUTHERLAND: We object to this on the same ground, and the additional, that it seems to be a partial order of John W. Plummer's.

Marked Exhibit "18."

Q. While Johnstone was there did you have any meeting of the board?
A. Yes, sir, after the staff was formed, we had an annual meeting.
Q. Who attended this meeting?
A. All these officers that could possibly attend.
Q. Any of the directors?
A. Yes, sir, I have seen.
COURT: What do you mean by the "staff"?
A. That list that was brought in here, he called his staff.
Q. Who was the directors who attended that meeting?
A. Mr. Samuel McIntyre was there sometimes, can't enumerate the times.

Cross-examined:

Q. When did you go to work at the smelting works?
A. On the second day of July, 1882—1st or 2nd.
Q. You knew Mr. Bowers well, did you?
A. Not particularly acquainted with him until I came down there.
Q. After that you knew him well.
A. I had to know him, as I was receiving instructions from him.
Q. Met him often?
A. Used to come down to the smelters once a week.
Q. I understand you to say that he was manager of the Mammoth Mining Company?
A. As he represented himself.
Q. Did you address him as manager?
A. I don't know whether I used the word "manager" all the time; but speaking of him, I would then speak of him as manager.
Q. Suppose you were addressing a letter to him in the business you were engaged, how would you address him?
A. I don't know that I should use the word manager regularly.
Q. What do you mean by that word "manager," in naming Mr. Bowers in connection with these works?
A. Mr. Bowers engaged me as superintendent of the smelting process. For anything I needed for the work, I had a
26 right to go to him and speak to him personally for anything I was in need of.
Q. You don't mean to say that he was manager of the Mammoth Mining Company, holding possession?
A. He told me he was manager.
Q. You don't mean he was given that name by the Mammoth Mining Company did you?
A. I was never at any of the meetings of the directors to enable me.

COURT: In other words you don't undertake to state how he came by the title of manager.

Q. I show you a letter bearing date December 23, 1882. Ask you whose handwriting it is, and whose signature it is.
A. It is my handwriting and my signature.

BENNETT: I offer that in evidence.
BROWN: Put it in.

(Marked Exhibit "19.")
(Bennett read letter.)

Q. I will show you another—whose handwriting—it bears date October 17, 1882?
A. That is my writing; my signature.

(Marked Exhibit "20.")

BROWN: You may read it.

Q. Did I understand you to say that Mr. Cunningham paid the pay-roll? Are you quite certain about that?

A. Yes, sir.

Q. The pay-roll made up in the usual form?

A. I should say that it was the usual form.

Q. Do you know about that? I will ask you if you mean to say positively that Mr. Cunningham paid the regular pay-roll, or did he only pay time-checks?

A. My office was then the superintendent's, and when anybody came down to pay the men, I was there at the works, and sent the men all in the office in groups; if they paid I can swear to their signature. I know that Mr. Cunningham came down with the book and the pay-roll. I can't swear because I was looking after the work.

Q. You don't know whether he paid the pay-roll or not?

A. Can't swear positively to it.

Q. Was that at the time Mr. Cunningham was there acting as trustee?

A. Oh, no; it was about the first month I went there.

27 Q. Was it as late as January, 1883, or February, 1882?

A. I seen him pay some men in November, those are the persons about what I am speaking of.

Q. Have you seen a check from him as trustee?

A. Yes, sir.

Q. There is a little check, date September 15, 1882.

A. That is my endorsement. I am perfectly satisfied I didn't get the money.

Q. When you received it you endorsed it?

A. Yes, sir.

BENNETT: I will explain that. There was a time when the money first commenced to come from England; that was the interval between the management of Bowers and Johnstone. Mr. Cunningham did the business.

(Check marked Exhibit "21.")

Q. Can you state the date when Johnstone appeared on the scene? You know him, I understood you to say.

A. I think it was either the latter part of November or beginning of December—I think it was December; I am not sure of that.

Q. Did you answer to Mr. Brown what capacity Mr. Johnstone acted in, so far as you observed that, or not?

A. He was represented to me as succeeding Mr. Bowers.

Q. Did he take charge of the works at any time?

A. He gave me instructions as Bowers did before.

Q. Can you fix the time?

A. No, I think about the time that the staff of officers was explained to me.

Q. Did you know—that is during the time he was in charge—what position he held, with reference to the works?

A. I knew all along myself that he was manager of the works.
Q. Did you receive any payments from him for your work?
A. I think so; a check one time.
Q. Did you have more than one check from him—I mean Johnstone?
A. Yes, sir; I think — had one of Johnstone's check- for me.
Q. You never received any check from Johnstone and Bowers on which they signed managers?
A. I don't know.
28 Q. Look at the check I hand you, bearing the date December, 1882, signed, H. A. Monroe, Butler Johnstone. You received that check?
A. Yes, sir.
Q. On what account did you receive it?
A. On the 25th day of December. This was about the time I sent up to the office——
COURT: He is enquiring of you more as to the fact of the capacity in which the person sent the check—more than anything else.
A. I understand positive that Mr. Johnstone was the manager succeeding Bowers——
COURT: He asked you if you received that check for services done at the smelting works, signed by Johnstone.
A. Yes, sir.
Q. You understood that Johnstone was manager?
A. I can't say that I had any knowledge further than Bowers said that Johnstone was succeeding him as manager; I had every reason to believe it seeing the board of directors around there that he was manager.
COURT: Answer this question; are you able to say from any personal knowledge that you have of the Mammoth Mining Company; that that company did appoint that person superintendent, that the attorney asked you, or do you base what you say upon the fact that he acted as such?
A. He acted as such.

(Check marked Exhibit "22.")

Q. Did you say you know another check—state whether you received that from Mr. Johnstone, endorsed it and had it cashed.
A. That check is from Plummer.
Q. It is not signed by Plummer.
A. He gave me that check.
Q. You received that check on account of services at the smelting works?
A. Yes, sir.

(Marked Exhibit "23.")

I offer another of the same sort, dated 12th of February, 1883.

(Marked Exhibits "24," "25.") Receipt marked Exhibit "26."

29 Redirect:

By Mr. BROWN: I see in one of these letters you speak of the Crescent Mining Company.

A. That is one of the names of the mine.

Q. What was the output of the smelting works—output of the matte per month, week or day?

A. I don't know that I can answer that question exactly; two or three sometimes—I think a car-load in a week, sometimes more.

Q. How many tons to a car-load?

A. 10 tons—20,000 lbs.

Q. Do you know to whom the matte was shipped?

A. To the Argyle works.

Q. Did you notice whose check you received from Cunningham as trustee?

A. No, sir, I did not notice it.

Q. Did you notice the word trustees?

A. No, sir, I don't think I noticed it.

Q. Do you know what all the works cost?

A. I don't know, two or three hundred thousand dollars.

COURT: Counsel has asked you as to what you know about this gentleman being trustee and manager; do you know of any one else over the works of the Mammoth Mining Co.?

A. No, sir.

COURT: Mr. Witness, where did you order the brick that was used on this smelting works from?

A. Came from the Mammoth mine.

Q. Masons belonging to this Mammoth mine?

A. Yes, sir.

Q. How far is the Mammoth mine from those works?

A. It was about, I should judge six or seven miles—five to seven.

Q. Would you have occasion to go to the mine occasionally?

A. Yes, sir.

Q. For what purpose?

A. To see that the ore was selected, when waste and rubbish would come down.

BENNETT: Did you ever ask Plummer, or ask Mr. Cunningham or McIntyres, or Bowers in the first place, about the position Johnstone afterwards held?

30 A. I didn't ask any such question.

Q. You knew them to be officers of the company?

A. They had been reported to me as being officers.

SUTHERLAND: I move to strike out the answer and question—his answer is calling for a conclusion.

COURT: Just state——

Q. Do you know of anybody else running these works except the Mammoth Mining Company, and if so, who?

A. No, sir.

Sutherland objects to it in that form—"If he knew of any person conducting the mine besides either of the defendants?"

Overruled. Exception.
Recess until 1.30 p. m.

Mr. HANEAUR, sworn:

Q. Where do you live?
A. Salt Lake City.
Q. How long?
A. Since 1873.
Q. Your business?
A. Buying of ores——
Q. What business in 1882–'3?
A. The same.
Q. During the year 1882–'3 did you buy any copper matte of the Mammoth Mining Company works?
A. I think I did.
Q. Where was it shipped?
A. To the Mingo works.
Q. To whom did you make the payment?
A. Payments were made to the Mammoth Mining Company, or that name—Johnstone—Butler.
Q. To whom was it payable?
A. As near as I can recollect to the Mammoth—made the checks to the Mammoth Company.
Q. On the London bank?
A. Yes, sir.
Q. Did you take them over yourself to the London bank?
A. Yes, sir.
Q. You know who got the proceeds of the sale?
A. Manager of the bank told me they went to the credit of the Mammoth Mining Company.

WILLIAM PUGSLEY sworn for plaintiff:

Q. Your name is Pugsley?
31 A. Yes, sir.
Q. Where do you live, Mr. Pugsley?
A. Salt Lake City.
Q. How long have you lived there?
A. About twenty-nine years.
Q. What is your business?
A. Book-keeper.
Q. For whom?
A. At present I am canvassing for Z. C. M. I.
Q. Know The Salt Lake Foundry & Machine Company, this plaintiff?
A. Yes, sir.
Q. A corporation at that time?
A. Yes, sir.
Q. Do you know of the plaintiff having an account with the Mammoth Mining Company?
A. Yes, sir.

Q. When did it begin?
A. I don't know exactly.
Q. Where was the office?
A. In the Foundry building in Salt Lake.
Q. What book is this I hold in my hand?
A. Order book.
Q. The entry made in your books are in this order book?
A. Yes, sir.
Q. Was that the first entry?
A. No, from this to this I don't say it is in that book.
Q. Statement he paid off?
A. This was furnished December 20th.
Q. This account began then?
A. I think there was a small balance.
Q. This is the first entry you have of the last year?
A. Yes, sir.
Q. Do you know who ordered these goods?
A. Butler Johnstone.
Q. Was it of the date of that order?
A. Yes, sir.
Q. What transpired at the time between yourself and Butler Johnstone?
A. I didn't have anything to do with this entry. I was in the office at the time he was brought——
32 Q. He was introduced to Mr. Pierpont as manager of the Mammoth Mining Company, by Mr. Morris?
A. Yes, sir.
COURT: Who is Morris?
A. He is Elias Morris, one of the directors of the Foundry Company.
Q. One of the plaintiffs?
A. Yes, sir.
Q. Brought in Johnstone and introduced him?
A. Yes, sir.
Q. With whom did you open an account on your books?
A. With the Mammoth Mining Company.
Q. How long did that account run on your books?
A. Three or four months.
Q. Did you at any time since that deliver an account rendered?
A. Yes, sir, I presented Mr. Johnstone with one.
Q. Did you ever render an account?
A. Yes, sir, to Mr. Johnstone.
Q. Did he order it?
A. Don't remember ordering any. January and February—think in first part of February.
Q. Was that the last?
A. Continued to deliver goods after that.
Q. After goods ceased to be delivered did you render an account?
A. Yes, sir. I don't know as I rendered an account; I think the account was rendered to the superintendent.
Q. Do you know anything about it?

A. I know it was; I made out the bills.
Q. So the account would be in your handwriting?
A. Yes, sir.
COURT: Did you make out the bill of the whole amount, the items, considered in this case?
A. Yes, sir.
Q. Commencing in December and running up to when?
A. To the time it was discontinued, in March some time.
Q. Did you keep a copy of that account?
A. Copy on the journal on the account rendered.
Q. Did you say you shipped goods at any time during this interval?
33 A. Yes, sir.
Q. How many items did that consist of; how many different orders?
A. I suppose there was between thirty and fifty shipments. Every day or two.
Q. From time to time?
A. Yes, sir.
Q. To whom did you ship these goods?
A. I think to the Mammoth Mining Company—I would not be certain—some different; some to Butler Johnstone, and manager of the mill.
COURT: I understand as a matter of fact that there was no such thing as the Mammoth S. Co.?
A. Yes, sir.
Q. What have you got there?
A. First entry in the journal.
Q. Same one you had before—December 20th?
A. Yes, sir. Shipped on December 22nd.
Q. You may state from the journal entries there the first shipments.
A. $144.50. Page of journal is 345.
Q. Go on, and give page and amount of other articles.
A.

Page	446	$110 60
"	348	77 40
"	351	151 50
"	356	22 13
"	362	208 19
"	363	111 14
"	364	200 87
"	366	26 06
"	369	262 99
"	372	210 75
"	379	211 64
"	380	17 25
"	381	119 25
"	"	164 00
"	382	177 00
"	"	32 21
"	383	215 76

Page 385		$82 61
" 388		53 04
" 398		96 76
34 Page 400		114 03
" "		127 86
Page 403		200 00
" 405		27 36
" 407		70 36
" "		70 50
" "		50
" 408		7 50
" 411		73 20
" 414		75 60
" 416		341 50

The date of the last one, March 31st, 1883, first, December 22, 1882.

Q. Who paid the expressage on this, or freight, whatever it was, do you know?

A. He paid the express or freight.

Q. Did you send some of this by express?

A. I don't remember now; some may have been sent by express.

Q. What was the general nature of those articles?

A. Furnace castings and machinery.

Q. Suitable machinery for constructing furnaces?

A. Yes, sir.

Q. Who made those entries upon the book, you or Pierpont?

A. I made some; I think Pierpont some.

Q. Who made the first entry on the order book?

A. Pierpont.

Q. Dated December 20th?

A. Yes, sir.

Cross-examination:

By Mr. BENNETT: Turn to the order book. Who gave the first order?

A. B. Johnstone gave the first.

Q. Who gave the second order?

A. I don't know whether—77.40. I don't know—probably the first order was not wholly filled—it was a verbal order taken down at the time.

COURT: I think you stated that the order was made at the works of the plaintiff.

A. Yes, sir.

35 BENNETT: Page 355, journal. $151.50, who gave the order for the material of which that charge was made?

A. I cannot tell you who made the order; sometimes come down to the works, and sometimes write.

Q. Any written orders for that part of this bill?

A. Yes, sir, there was some written orders.

Q. Have you possession of them?
A. I don't know whether they have or not.
Q. Do you know who gave any of the orders which appear in the journal apart from the first orders?
A. Yes, sir, Butler Johnstone gave some.
Q. Do you know of anybody else?
A. Mr. Plummer.
Q. Anybody else?
A. Mr. Stringer.
Q. Anybody else?
A. Yes, I think Elias Morris ordered something.
Q. Anybody else order any?
COURT: Who is Elias Morris?
A. One of the directors of the Salt Lake Foundry Company.
Q. How did he come to give the orders?
A. He was doing work for the Mammoth Mining Company.
Q. In another part?
A. Yes, sir.
Q. Did you or not ship all these various bills?
A. Yes, sir.
Q. Who was the order sent to?
A. "Butler Johnstone, Mammoth Mining Company, Tintic."
Q. Who was the next order shipped to?
A. The same way.
Q. Does your book show how the order was shipped?
A. Shows who to ship the first order to.
Q. Look at your second order and see——
A. The second order don't state who to ship it, but I suppose it was the same way.
COURT: Who is it charged to?
A. To the Mammoth Mining Company.
Q. What is the first order?
A. Mammoth Mining Company, December 20th: 48 pieces
36 of iron. Mammoth Mining Company, shipped to Butler Johnstone, Tintic.
Q. What about the third order; who was that shipped to?
A. The book don't indicate.
Q. Do you know who it was shipped to?
A. I don't know, suppose the same way. The books don't show.
Q. Don't it show any other orders except the first?
A. I don't know whether it does or not.
Q. There is one order—don't show who to ship to?
—. ——.
Q. One order by Stringer?
A. Stringer, yes, sir.
Q. Have you all the orders under your eye now?
A. Yes, sir.
Q. Turn and see if orders were made by anybody else, and who they were shipped to.
A. One by Mr. Morris.
Q. What date is that?

A. That is January 30, 1883.
Q. Any indication as to whom those goods were shipped to?
A. No, sir.
Q. Do you know who they were shipped to?
A. I know they were either to the Mammoth mine or smelter; part shipped about the same way; sometimes to the mill and sometimes to the smelter.
BROWN: I want to know if that came to the office and was filled?
A. Perhaps you can tell by turning to the book——

(Exhibits letter.)

Q. Well, it was shipped on February 1st. The question is whether that order was received by that company.
A. Yes, sir.
Q. And filled?
A. Yes, sir.
Q. Goods sent and included among the items already referred to.

BROWN: I offer that.

Same general objection.
(Marked Exhibit "14.")

37 A letter January 29, 1883, addressed to Pierpont, superintendent of Salt Lake City foundry, containing order for goods, headed the Mammoth smelting works, signed D. Springer, superintendent.

Q. Do you know anything about that telegram?
A. Yes, sir. Yes, I remember something about that.
Q. Was that handed to you?
A. Yes, sir, I think it was.
Q. What was done in pursuance of that telegram handed to you?
A. I suppose it was sent to——
Q. Telegram was sent down?
A. Yes, I think so.
Q. Do you remember who brought it?
A. No, sir.
Q. You remember it came to you?
A. Yes, sir, I remember seeing it.

BROWN: I offer that.

Objection.

COURT: It is from Plummer to Litchfield.
Just read it.

(Telegram introduced and marked Exhibit "27,") and read as follows:

"TINTIC, U. T., *March* 17, 1883—12:05 p. m.

Col. J. W. Plummer, manager Mammoth Mining Co.

Send boiler-maker with tools, also six tubes sixteen feet by four inches, and one sheet quarter-inch boiler iron.

LITCHFIELD,
Superintendent Mill."

C. C. BARR sworn for plaintiff:

By Mr. BROWN: Where do you live?
A. Salt Lake.
Q. What is your business?
A. — for the last four years.
Q. Do you know the Mammoth Mining Company?
A. Yes, sir.
Q. Know where their works are situated?
A. Yes, sir.
Q. Were you over to the works in 1882–'3?
A. Yes, sir.
Q. Did you have any business there with the management?
A. Yes, sir.
Q. What was the nature of your business with the management?
38 A. Building a boarding-house—and family.
Q. Did you have any talk with either of the McIntyres in reference to your business there?
A. I spoke to them about starting a butcher shop—Samuel McIntyre.
Q. Did you have a talk with William McIntyre?
A. Yes, sir.
Q. What was your talk with him?
A. For my beef?
Q. What did you say to Samuel McIntyre?
A. I spoke to him about starting a meat shop, and asked if he had any beef to let me have; he said he thought his butcher had some.
Q. Was there anything said for whom you were to furnish it; for the company or him?
A. No, sir.
Q. Was there a talk between you later?
A. Yes, sir.
Q. What was that talk?
A. It was a week or two later than the first conversation about the shop. I understood it was the company's ground close by, and I wanted to get a place to put a shop. Samuel McIntyre referred me to Bowers to see him. I went to Mr. Bowers, and we agreed on the price of the meat.
Q. You went first to Samuel McIntyre, and he said that Mr. Bowers was the man?
A. Yes, sir.
Q. Did you have any other dealing with Bowers?
A. I furnished the boarding-house with supplies.
Q. In the course of that dealing did you receive that document?
A. Yes, sir.
Q. At the date of it?
A. Yes, sir.

Offered in evidence.
Same general objection.

(Marked Exhibit "28")

Q. You know Mr. Cunningham?
A. Yes, sir.
Q. Did you have a talk with him about this?
A. Yes, sir.
Q. When was it?
39 A. I can't exactly say; I think in August; was down there one evening—had been paying the men.
Q. August, 1882?
A. Yes, sir.
—. ——?
A. I asked him if there was any money for me. He said he just came down, and paid a small number of hands to keep them going.
Q. What else; is that all?
A. Yes. I think that is the substance of it.
Q. At the time you got this beef from Mr. McIntyre did you talk with him about the manner of collecting the bills of the company?
A. Yes, sir. When I made arrangements with him about the beef. Had made an arrangement with Mr. Bowers to put my bills in the office to keep out of the workingmen's wages.
Q. He put in his bills at the same time?
A. And kept his out of mine.

Cross-examined by BENNETT:

Q. When did you commence to supply Mr. Bowers?
A. I can't exactly state the date of the month, but I believe in May or June. Can't say exactly.
Q. I will ask you to look at the nine bills I hand you, to whom they were, and who signed them, if anybody—receipted them.
COURT: Are they all alike?
A. They are substantially alike.

COURT: They were to the same parties?

Q. To whom did they run?
A. W. H. H. Bowers.

BENNETT: I offer these nine bills in evidence.

(One marked Exhibit "29.")

COURT: What does this "M. M." mean?
A. I always understood it was the Mammoth Mining Company.
Q. January I understand you—25th of January—another in July, and August—ask you to whom they ran, whether you received money on those checks.

BENNETT: I offer these checks in evidence.

They are signed by W. H. H. Bowers, and countersigned by W. H. H. Bowers.
(Checks marked Exhibit "30.")

Q. Three checks—ask you if you——

A. I had the money on them.

(Checks marked Exhibit "31.")

BROWN: Did they offer explanation why these checks were not good if not signed and countersigned W. H. H. Bowers?

A. No, sir, I don't know.

W. E. JACOBS sworn for plaintiff.

By Mr. BROWN: Mr. Jacobs, what is your business?

A. I am a contractor and civil engineer.

Q. What was your business in 1882–'3?

A. Latter part of 1884, and early part of 1883, was assaying.

Q. For the Mammoth smelting works?

A. Yes, sir.

Q. Where?

A. In Tintic.

Q. How far away from the mine is that?

A. Seven miles, about.

Q. Was it a railroad station?

A. Yes, sir, I think, some kind. I was sometimes down to the Tintic Station.

Q. More than one railroad?

A. One railroad.

Q. How long were you assaying there?

A. About eleven months altogether.

Q. Did you make reports of that assay-work?

A. Yes, sir.

Q. How frequently did you make them?

A. Every day; almost every day.

Q. How accurate were those reports?

A. Three or four made; one I kept myself, and one to Mr. Bowers, and afterwards to Mr. Johnstone, when he was in town, otherwise delivered to him in his office at the works, and one to Mr. Stringer, and sometimes to Mr. Plummer.

Q. They were the persons that received them?

A. Yes, sir.

Q. Did any of these directors look them over?

A. Saw them sometimes.

Q. Who?

A. Mr. Cunningham and Samuel McIntyre.

Q. Cunningham and McIntyre?

A. Yes, sir.

Q. Was the assays that you made uniform?

41 A. Yes, sir.

Q. Won't you tell us what was the assay?

A. I can. I have the Mammoth Mining Company daily assay report. (Mammoth Mining Co. blanks.)

Q. Did you say that on the trial of the Morris case *vs.* Mammoth Mining Company?

A. Yes, sir.

Q. That is the third proceedings?

A. Yes, sir.

COURT: What do you mean by assay?

A. Ascertained what percentage of copper, and what amount of silver and gold to the ton.

COURT: You took assays of the slag (?) that came to the furnace, and from it you make your calculation?

A. No, sir, the ore was sent to me, and we have a smelting process for the smelting of silica, silver and gold.

Q. So you know the value?

A. Yes, sir.

Q. You may state to the court the process of assaying a sample of or to determine the value of the ores.

A. Yes, sir; usually from, etc.——

Q. What do you mean by matte?

(Witness explains.)

COURT: Do I understand you to say that your assay was as you have described during the time that this account is sued for by this plaintiff?

A. Yes, sir.

J. R. NICHOLS sworn for plaintiff.

By Mr. BROWN:

Q. Where do you reside?

A. Salt Lake City.

Q. What is your business?

A. Mining.

Q. What else?

A. Not exactly mining, connecting with the management of mines.

Q. Have you sold machinery af any time?

A. Yes, I have done so.

Q. What business was you in in 1882?

A. Was connected with some works; with some my wife owned.

42 Q. Your business was in regard to machinery—did you have some business transactions with Bowers?

A. Yes, sir.

Q. Was it for machinery for the Mammoth Mining Company works?

A. Yes, sir.

Q. State what your transactions were.

A. Crushing rolls.

Q. When?

A. 19th of April, 1882.

Q. State what transpired.

A. I made a bargain with Mr. Bowers up to the Mammoth Mining Company's office in Salt Lake City.

Q. Anybody present when this was made?

A. Corker.

Q. Anybody else—Sam. or both McIntyres?
A. No, sir.
Q. What did he give you in the way of paper?
A. Three notes, I think.
Q. Have you got them here?
A. One of them.
BROWN: This one don't seem to be entirely whole.
A. Some piece of it.
Q. What piece of it?
A. Signature.
Q. What was the words?
A. W. H. H. Bowers, manager.
Q. Did you see the McIntyres in regard to this transaction at any time afterwards?
A. No, sir, I think not.
Q. Did you subsequently have any transaction with Butler Johnstone?
A. The only one I had was with Mr. Austin in the London bank.
Q. What was that; you may state what it was?
A. More with reference to a check I got afterwards.
Q. You may state what it was.

Objected to.

BROWN: He was a director.

Q. You may state what talk there was.
A. I talked with Mr. Corker in regard to it. I asked Mr. Austin; I wasn't willing to take Mr. Bowers'——

Objected to.

43 WITNESS: They informed me that that kind of a signature was all right; that was the Mammoth Mining Company's bank.
Q. What do you mean by that signature?
A. It was signed W. H. H. Bowers, and not good if not countersigned.
COURT: You mean that if it wasn't countersigned by that same person, it would not be question against the company?
A. Yes, sir. It was to be paid out of the Mammoth Mining Company.
Q. When was this transaction with Austin?
A. I think on the 19th of December.
Q. 1882?
A. Yes, sir. Check dated July 25th, 1882.
Q. Now, we will come to that arrangement with Butler Johnstone. Did you have a talk with him about machinery? Did he call also on receipt of the note?
A. Requested me to call at the office.
Q. What office?
A. Mammoth Mining Company. He was about *ot* give me an order for machinery.

Q. Who was?

A. Johnstone. For a screen—when one of the McIntyres spoke up and said he didn't think that it was necessary; there had been a set-down there before; he was about to give an order to me.

Q. You was about to get an order when McIntyre spoke in this way?

A. I was.

Q. Do you remember what expression he used?

A. "Would not answer our purpose; they had a set of them in June, previous."

Q. There was no other paper in question in this first transaction with Bowers?

A. There is copies of the shipping receipts.

Q. Shipping bills?

A. No, sir, only copies.

Q. Do you know—you didn't notice how you shipped the goods?

A. Yes, Mammoth Mining Company, Tintic.

Q. What is this receipt?

A. For screens he received. Vouchers made out in the office of the Mammoth Mining Company.

44 COUNSEL: I offer that voucher.

Q. What is the date of it?

A. June 12th, 1882.

Same objection.

(Marked Exhibit "33.")

Q. Look at the three checks I hand you, and state whether they had any connection with the sale of the machinery to Mr. Bowers, and if so, what.

A. Yes, sir.

Q. What connection had they?

A. In part payment for it.

Q. For this machinery?

A. Yes, sir, it was on the first shipment—on the shipment made on the 7th of June.

COUNSEL: I offer these three checks. Check by W. H. H. Bowers, July 3d, 1882, and one July 19th, 1882.

COURT: Are they all countersigned?

(Marked Exhibit "34.")

Q. You have an account against this company accruing out of these matters?

A. Yes, sir.

Mr. ATWOOD sworn for plaintiff:

Q. What is your business?

A. Brick-maker.

Q. Did you furnish any brick to the Mammoth Mining Company?

A. Yes, sir. In 1882, I believe.

Q. In pursuance of a written contract?
A. Yes, sir.
Q. Was that the contract under which you furnished them?
A. Yes, sir.
Q. Do you know the handwriting of that name to it?
A. Yes, sir, Mr. Bowers'.

Same objection: There is no evidence that the defendant knew of it. Overruled; exception.
(Marked Exhibit "35.")

Q. Was the brick delivered in pursuance of that contract?
A. Yes, sir, I made them, yes, sir.
Q. Whereabouts did you make them?
A. At the Despatch brick yard.
Q. Where were they hauled?
A. At the Mammoth mill, I believe.
Q. What were they used to build?
A. A furnace, I believe.

Cross-examination:

Q. Do you remember a conversation with Mr. William McIntyre before you delivered any brick, in regard to the furnishing of brick?
A. With Mr. McIntyre—no, sir.
Q. Did you have any conversation with him before you delivered any brick?
A. I had a talk with him; I don't remember what it was exactly.
Q. Did he not in substance tell you Mr. Bowers had no right to contract for the company?
A. No, sir.
Q. Who paid you?
A. The other men, Mr. Bowers and Butler Johnstone.
Q. Did Mr. Cunningham pay you anything on account of the brick?
A. Yes, I believe he gave me one check, if I recollect.
COURT: Did Samuel McIntyre know that you had made that contract with the Mammoth Mining Company?
A. I suppose he did.
Q. Can you say that he knew that?
A. I can't say certainly.
BENNETT: Didn't you have a talk with Mr. Samuel McIntyre when you were looking for brick ground; ground for which to make brick?
A. Not that I recollect of. I was to make the brick on the ground, I made them on the Despatch brick yard.
Q. Didn't you see Mr. McIntyre at the time you were transacting for brick clay at or near his house?
A. I looked around for sand, but not for clay.
Q. Did you see him at that time at or near his house, when you were looking for clay?
A. I have seen him alone.

Q. Didn't you ask about Bowers?

A. No, sir.

Q. Didn't he tell you about his connection with the Mammoth Mining Company?

A. No, sir.

46 Q. Five checks I hand you. James Cunningham, trustee, to D. T. Attwood purporting to be signed by H. A. Monroe, Butler Johnstone. They are dated January, 1883—$1,634.50. One July, 1882 for $562.—and two bills of produce (?) one dated Salt Lake City, 1882, from W. H. H. Bowers. I will ask you if these checks were issued to you and whether these bills were made out and receipted by you?

A. Yes, sir.

COUNSEL: We offer these in evidence.

(Marked Exhibit "35.")

Q. Were you a witness in the case where Elias Morris was plaintiff and The Mammoth Mining Company was defendant?

A. I was.

Q. More than one case?

A. Twice, I believe.

Q. Did you not when on this trial, state in answer to a question, that Mr. McIntyre told you that Mr. Bowers had no right to contract or anything to do with the Mammoth Mining Company?

A. He told me that after I was there.

Q. I ask you if you didn't testify that Samuel McIntyre told you that, in substance, prior to the time that you commenced making bricks?

COURT: He asked if you said that before you made the bricks.

Q. Before you commenced?

A. I don't recollect that.

Q. Did you testify to that in substance in the Morris case, in Salt Lake City?

A. Not that I recollect about it.

BROWN: When was your talk with McIntyre—after the bricks were delivered?

A. Had one——

Q. When was the first talk?

A. In the last of September, 1882.

Q. He knew at that time that Bowers was contracting for that company?

A. He told me so.

Q. Had you talked to him before that about the contract?

A. Not that I recollect about.

47 JOHN S. GROW sworn for plaintiff:

COURT: Unless you have something new in that line, I don't care to hear any more of it. Of course, anything different from that you have offered, I desire to hear.

BROWN: I was going to ask about the talk with Cunningham.

Q. Mr. Grow, what is your business now?
A. Carpenter and builder.
Q. What was your business in 1882–1883?
A. Was in the lumber business.
Q. Was you in the employ of the Mammoth Mining Company?
A. Yes, sir.
Q. What time?
A. In April, 1882, I intended to go in March 1st.
Q. What different capacities did you fill while down there?
A. About all the time at the saw-mill, sawing lumber, framing mining timbers; part of the time at the mine.
Q. What at the mine?
A. Took charge of it.
Q. Where was the saw-mill?
A. Twelve miles north.
Q. At Boulder Springs, twelve miles north?
A. Yes, sir.
Q. Is that near a railroad?
A. Yes, sir.
Q. When did you go to this saw-mill, and how long did you remain there?
A. From April, 1882, until October—some time in October.
Q. Had you been acquainted with Cunningham and McIntyres?
A. Yes, sir.
Q. Did you go before Bowers becoming manager?
A. Yes, sir.
Q. What doing there?
A. Foreman of the mine.
Q. Do you remember one time that Mr. Cunningham going up to the saw-mill while you were there?
A. Yes, sir.
Q. When was it?
48 A. In October, 1882, as near as I can remember.
Q. Did you ever talk with him there?
A. Yes, sir.
Q. What was the talk you had on that occasion?
A. Well, he wanted me to reduce the force there; only keep enough men to procure enough timber that was required for the mine.
Q. Did he say anything else about Mr. Bowers' connection with it?
A. I don't know.
Q. Did you have any talk at any time about Bowers' connection with it?
A. That was the only time.
Q. He wanted you to reduce the force at the saw-mill?
A. Yes, sir.
Q. Who else was there at the mill at that time?
A. Fifteen or twenty men there.

Q. How did Cunningham come up on that occasion?
A. Came up on the train.
Q. Do you remember his being there in a buggy?
A. Not while I was there.
Q. You remember his being there and telling you to reduce the force?
A. Yes, sir.

Cross-examination by Mr. BENNETT:

Q. When was it that Cunningham told you to reduce the force?
A. As near as I can remember about the 1st of October; might have been the last of September, 1882.
Q. You are not positive about the time?
A. I was not positive.
Q. Was it in November?
A. I am not positive.
Q. Do you remember the time he was acting as trustee?
A. Yes, sir.
Q. Was it during that time?
A. He was acting as trustee before I knew it. I didn't know of his acting as trustee until afterwards. After I had left the saw-mill; suppose he acted for a month as trustee before.
Q. In November, 1882—was this conversation in the month of November?
49 A. It was, as near as I can remember, the last of September, or the first of October.
Q. Anybody with him when he made this statement?
A. No, sir.
Q. Was it on the train?
A. Yes, sir.
Q. Where?
A. At Boulder Springs.
Q. Did he get off the train?
A. No, sir, he was standing on the platform of the car.
Q. Got on the platform of the sleepers?
A. No, sir.
Q. You were at the train?
A. Yes, sir, and the train stopped there.

BENNETT: I have a number of papers. I offer the bundle of vouchers.

(Marked Exhibit- "36" and "37.")

Re-examined:

BROWN: I find in one of those letters a document.

Q. Do you know anything about that language? Well, what do you know about it?
A. That was an article that was published in the daily papers, Salt Lake, in January, 1883.

Q. You saw it published in a newspaper of general circulation?
A. Yes, sir.

BROWN: I will offer that.

Q. Do you know what newspaper?
A. One of the daily newspapers of Salt Lake City. I think it was the Tribune.

Objection: As hearsay and incompetent. Overruled. Exception.

"Mammoth Mining Company.

"Any one having claims against this company is required to send in a statement, &c.

"This notice is in reference to the company's month's account. The pay day of the Mammoth smelting works will be Monday the 15th inst.

"H. A. MONROE,
"BUTLER JOHNSTONE."

Q. While you were working for the company, state whether you received those letters.
A. Yes, sir, I received a number of letters.
Q. Just like this?
50 A. Yes, sir.

(Marked Exhibit "38.")

GEORGE CRIPPS sworn for plaintiff:

Q. Where do you reside?
A. Salt Lake City.
Q. Where was you in 1882–'3?
A. Down to the Mammoth Mining Company.
Q. What part or branch of the Mammoth Mining Company were you engaged in?
A. Running an engine at Boulder Springs.
Q. What time?
A. From the commencement until the finish.
Q. Do you remember of seeing Mr. Cunningham there in the fall of 1882?
A. Yes, sir.
Q. Do you know about what time he was there?
A. No, I can't say exactly; it was in the fall of 1882, certainly.
Q. Did you hear him say anything there with regard to the management of affairs?
A. Yes, sir. He came there in a buggy one morning, with another man I don't know, he came there for the purpose of taking some lumber away. I said to him, if you brought any money. He says I have nothing to do with the money—"all my men claiming that no lumber go from here until they got some pay."

Objection.

COURT: I understand there is proof that Cunningham was the president of the company.

Q. Was there a time that he said Bowers had nothing to do with the affairs of the company?

A. I don't remember. I know I was rather chagrined, not finding any money coming.

Q. Say anything about Bowers' connection with the company at that time?

A. Not that I remember.

Q. Say who was manager at that time?

A. I don't really remember; it was so long time ago.

Q. Did you hear whether he said anything on the subject of who was manager?

A. He did say something with reference to him: he said You have to go to look to Mr. Bowers for your money.

51 Q. Was there anything said about holding the lumber?

A. Came for that purpose.

Q. Was there a man by the name of Green there?

A. Yes, sir. Green was attempting to hold the lumber; he says When you get the lumber and pay for it, you can have it.

Q. What did Cunningham say to that?

A. I don't know.

Q. Was you present at the time that Cunningham said that Bowers had nothing to do with the management of the affairs there?

A. I don't remember him saying so.

Q. Do you know when Butler Johnstone came?

A. I know he was there.

Q. Was that before or after Butler Johnstone came?

A. I don't know whether it was the identical time or not.

ELIAS MORRIS sworn for plaintiff:

Q. Mr. Morris, where do you reside?

A. Salt Lake City.

Q. What is your business?

A. Contractor.

Q. Did you at any time have anything to do with the works at the Mammoth construction?

A. Yes, sir.

Q. When did you have anything to do with it?

A. In November, 1882. Up to March, I think.

Q. From November, 1882, until March, 1883?

A. Yes, sir.

Q. What were you doing?

A. Building furnaces at the smelter.

Q. Who asked you to go there to work and build these furnaces?

A. Mr. Cunningham called upon me first.

Q. J. A. Cunningham?

A. Yes, sir.

Q. When was this, that you made the arrangement?
A. I think in the beginning of November.
Q. He employed you to go to work?
A. Yes, sir.
Q. How long was this before Butler Johnstone appeared upon the scene?
52 A. Six weeks or a month.
Q. When he came who introduced you to him—Butler Johnstone?
A. First he was introduced in the Mammoth Mining Company's——
Q. In the office?
A. Yes, sir.
Q. Where was their office?
A. No. 101 Main St., I think.
Q. Who was there at that time?
A. There was Mr. Cunningham, and I think one of the McIntyres.
Q. Anything said as to what he was going to do?
A. No, sir.
Q. Didn't you receive directions from Cunningham to truckle to Johnstone and take orders from him?
A. Yes, sir.
Q. Who gave them?
A. Cunningham.
Q. What time, with reference to Butler Johnstone's advent?
A. I think about the 10th of December, 1882.
Q. Before or after Johnstone's arrival?
A. After he arrived.
Q. What did Cunningham say on the subject?
A. I had been doing the work under Cunningham; he said he had concluded to turn the management of the affairs to Johnstone, and from that time I would receive my orders from him and do the business through him.
Q. In connection with your employment did you have occasion to order material for the company?
A. Sometimes I did.
Q. Sometimes for the company and sometimes yourself? They furnished the materials?
A. Yes, sir. They would ask me when I came down to go to the foundry—would look at my convenience—and go and order them.
Q. Did you order things for the construction of this building from the plaintiff?
A. Yes, sir.
Q. What things did you order?
A. Binding rods for the stacks in the furnaces.
53 Q. General stock in the construction of the furnaces?
A. Yes, sir.
Q. Did you in the course of your investigation, notice Mr. Johnstone down in the foundry?

A. Yes, sir.
Q. Did you have any connection with the foundry at that time?
A. Yes. I was president at that time.
Q. How did you introduce him to the superintendent?
A. As manager of the Mammoth Mining Company.
COURT: Was this after the conversation with Cunningham?
A. Oh, after, sir.

Cross-examination:

By Mr. BENNETT: When did you say you commenced doing work at the defendants' works?
A. I suppose in the beginning of November.
Q. Who employed you?
A. Mr. Cunningham.
Q. As trustee?
A. He said he was trustee.
Q. Did he say for whom and what?
A. No, sir.
Q. Did you hear for whom he was trustee?
A. I can't hear.
Q. What did you hear?
A. He called upon me for an estimation for these furnaces. He would like to have me put up those furnaces, and would like to get an estimation from me. I told him I would give him an estimation. Told me I better go down to the London bank to see Mr. Austin; he said I would like to have you do that, Mr. Morris, if you can give a figure satisfactory. Then I asked him about the pay; he says, We won't go on with the work any farther than what we get the money to go on with. They were expecting money from England from the sale of stock. I went to make an estimate. Mr. Cunningham called again; I gave him the figures; he said I was a little too high, he would like for me to do that work if I could drop down a trifle; would like me for it. I did so and agreed upon that to go and make a start.

54 Q. You understood that Mr. Cunningham and Mr. Austin were contracting as trustees in the hope of money coming from England? You understood that, didn't you?

A. Mr. Austin said he was acting as trustee, and further said that as he was engaged in a bank account—would like to employ Mr. Cunningham to see to it.

Q. Was there a time that Mr. Cunningham was acting as trustee, you furnished goods upon his order as trustee, and received checks signed as trustee?

A. Yes, sir, I will say that these were furnished by Cunningham as president, and checks were drawn in payment of the bills as trustee.

BENNETT: One bill is November, 1882, and one November, 1882. One check in November 17th, 1882.

Q. These was bills made by you, and checks made to you, and money received on the checks?

A. I would like to make this statement; I had been furnishing the Mammoth Mining Company for materials for months before this to the Mammoth Mining Company by the orders of W. H. H. Bowers, manager of the Mammoth Mining Company, and when Mr. Cunningham came there and set down this contract he gave instructions that we was to keep the accounts in his name.

Q. After this conversation you had when Mr. Austin said that the money was coming from England?

A. Yes, sir.

(Marked Exhibits "39" and "40.")

Shipping bills.

(Marked Exhibit "41.")

By Mr. BENNETT:

Q. How long a time did you furnish materials to Austin and Cunningham, trustees?

A. Maybe something in the neighborhood of a month, or so, I think.

Q. State whether or not at the end of the time that you ceased furnishing to them as trustees there was a balance from the trustees to you?

A. Well, they hadn't paid up what they ordered.

Q. After they had ceased ordering what was done with the account?

A. Carried right on.

Q. In whose name?

A. I think in the same way.

55 Q. Is it not true that the bills was O K'd by Mr. Cunningham, and all went to Mr. Johnstone?

A. When I suggested to him, and wanted to settle up his account before starting a new one he could not settle.

(Bill account of trustees marked Exhibit "42.")

WITNESS: I think that is the account of what they received in that month.

Q. Did Mr. Cunningham as trustee O K the balance of the bill had against the trustees?

A. I think he did; and it went to Johnstone's account.

Q. You know Butler Johnstone?

A. I don't know whether I do or not. Know very little, I wish I had known less. I met him.

Q. When did you meet him?

A. In the office of the company.

Q. Who was there?

A. Mr. Cunningham. I think Mr. McIntyre—one of them.

Q. It was in the office?

A. I think that is where I found them, right in the office.

Q. Was Bowers there?

A. I don't know. I was introduced to him as a gentleman from England, and that is all that happened that night.

Q. Did Mr. Cunningham state to you in what capacity Mr. Johnstone came from England; for what purpose?

A. No, sir, they did not.

Q. Did you have a conversation with Mr. Austin about the time Johnstone arrived, about who he was and who he represented?

A. Some time after that.

Q. About when?

A. So far as who he was, I don't remember anything in regard to that.

Q. Do you remember the transaction you had with Johnstone in regard to any loan of $5,000?

A. Yes, sir.

Q. When did that occur?

A. I think 23rd or '4th of December.

Q. When did Johnstone arrive here?

A. To the best of my recollection on December 7th or 8th.

Q. Call your attention to a check for $5,000 for the pur-
56 pose of a loan of $5,000 to Butler Johnstone.

A. Yes, sir.

Q. At or about the time you drew the check and loaned the $5,000—state whether you took a note, or whether a note was given you, handed to you for the $5,000, signed by A. Monroe Butler Johnstone.

A. Mr. Austin brought the note written up by himself and signed by Mr. Johnstone; said that Johnstone had gone to Tintic, and he spoke to me or me to him—when I saw that note I said, I didn't loan that money. I objected to that note and threw it on the table. My check was all I will have go into the bank. I had a little conversation then with Austin.—I asked him a few questions, then in regard to this money. I supposed I was working for the Mammoth Company, and that they had some kind of a scheme to dispose of their stock and from the proceeds to increase the capacity of their works, and Mr. Austin told me that there was men—a number of Englishmen—lords, dukes and the devil—buying their stock and large sums of money coming; that there was a large block of men right there. And Cunningham told me the same things over. Butler Johnstone had been a member of Parliament and lord——

Q. Didn't you understand that Butler Johnstone had been sent out by the English lords and dukes——

A. I don't understand it.

Q. Didn't you understand that there was coming from these people——

COURT: That money was to be derived from the sale of stock of the Mammoth Mining Company?

A. Yes, sir.

Q. You got that from Cunningham and Austin?

A. Yes, sir; that they were disposing of Mammoth stock, and the proceeds of that stock was coming here to increase the capacity of the work of the company.

BENNETT:

Q. Did you have a conversation with Butler Johnstone the day before you gave him this check?

A. I did.

Q. State what he said to you in regard to the moneys coming from England.

A. He wanted me to build him a brick kiln. I took him down to the brick yard and showed him; and down there he got
57 to talking about the works—asking a great deal. He said "If I could see over eight or ten days, then we can swim with ease without any trouble whatever in rushing on the works." Says I, "Mr. Johnstone this way; that we don't have money to pay for the materials that was loaned on that work—if I know that to be true and correct, I don't know but what I would loan that money to get over this embarrassment—that $5,000 for a few days. That is all the conversation." He says, "If you do, you will grant us a great favor." I expected him over,—he sent Austin; he went off.

Q. Did he in that conversation say to you that the money he expected to get was money to come from England?

A. Yes, sir, that is what I understood, the money was coming from.

(Check marked Exhibit "43.")

Q. I will read an answer which I understand you made on the trial of the case of the Mammoth Mining Company, being the second trial of the case; I ask you if you did not testify in that trial in the language I now read to you, relative to money from England. Question. You may state the transaction with reference to loaning money, with whom you dealt directly, and the whole detail—when and where it occurred, and with whom and so on.

Answer. On the 23d of December, if my memory serves me, 1882, Mr. Johnstone wished to go down to my brick yard to see my kiln, that he intended to build one like it; on the way going he mentioned to me that if he could see nine or ten days over, they could swim with ease; I asked him what he meant, and he said from stock sold in England—London, there was $240,000 on the way; he expected to start if it wasn't on the way, and would free them from all encumbrances; at this time they were so short of means that they could not get their materials unloaded from the cars, as they had no means to pay for the freightage; the track was full of cars of fire-brick and fire-clay, and iron, that we needed for the furnaces. At this time I had some 50 or 60 men of my own under contract, and I was liable for their board, and loss of time, and I couldn't get away till I completed my contract. I told him then, I says, "If you are positive that this money you mentioned will be here within that time, I think that I can find a way that I could raise as much as $5,000 that will help to free the freight,
58 and enable us to go on with our work." He said it would be a great favor, and that ended it. I said further, says I, "I don't loan this for the sake of interest—it is an accommodation,

to forward on the work, and nothing else;" nothing else was said that day, and I expected he would call on me some other time, but instead of coming himself, he sent Mr. Austin, the manager of the London bank, who called at my place a little before 10 o'clock the next morning, and said that he had a conversation with Mr. Johnstone, or Mr. Johnstone with him, and I kindly offered the use of $5,000 to help them in the paying of those debts and freights. I said, "Yes, I had a talk with him, but I expected to see him himself." "Well," says he, "he was in a hurry to go down to Tintic, so he took the train that morning, and left a little scrap of paper, just two lines, as a note for value received." I said to Mr. Austin, says I, "I didn't expect a note drawing interest; I just accommodated them for a few days to help them out of their embarrassment unti- this money they were expecting should come." He said, "That was very kind of you." "Now," says I, "Mr. Austin, I would like to have a word with you." Says I, "This money that they expect from England, and those gentlemen that has been mentioned to me by several parties interested there," says I, "I suppose you know something about it." He said "Yes." Says I, "Can you explain something about these monies coming for stock?" and he mentioned five or six names, lords, and members of Parliament, and I don't know who, and that they were millionaires and reliable. I says, "How is it, if they are reliable, that you, as manager of this bank, cannot loan them this amount of money; you are a member and a director." He said, "I have allowed so far as the law allows me; it is enough for my situation if I allow any more. I dare not allow any more than so much." Says I, "Upon this I will let you have it." I wrote him a check, which was to go direct toward those debts and freights.

Q. Did you so testify on that trial?

A. Yes, sir. Just the same I do to-day. The amount of money was named.

Q. Mr. Morris, what relation did you bear to the Salt Lake Foundry Company during the month in 1882, and January, February, and March, in 1883?

A. President of the company.

Q. After Mr. Johnstone arrived here on the 10th of No-
59 vember, did you do business with him by the way of doing work under his orders?

A. The orders and the labor continued right along without a change in anything until we finished.

Q. Except you charged the items to Butler Johnstone after the trustees went?

A. I said that Cunningham gave me instructions to charge to Johnstone from that time on, so keep his account separate so that he could straighten out his.

Q. During all the time that Cunningham and Austin acted trustees had you had transaction with W. H. H. Bowers?

A. Yes, sir.

Q. How long a period of time?

A. During 1882.

BENNETT:

Q. Did you have a conversation with Butler Johnstone the day before you gave him this check?

A. I did.

Q. State what he said to you in regard to the moneys coming from England.

A. He wanted me to build him a brick kiln. I took him down to the brick yard and showed him; and down there he got
57 to talking about the works—asking a great deal. He said "If I could see over eight or ten days, then we can swim with ease without any trouble whatever in rushing on the works." Says I, "Mr. Johnstone this way; that we don't have money to pay for the materials that was loaned on that work—if I know that to be true and correct, I don't know but what I would loan that money to get over this embarrassment—that $5,000 for a few days. That is all the conversation." He says, "If you do, you will grant us a great favor." I expected him over,—he sent Austin; he went off.

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59 vember, did you do business with him by the way of doing work under his orders?

A. The orders and the labor continued right along without a change in anything until we finished.

Q. Except you charged the items to Butler Johnstone after the trustees went?

A. I said that Cunningham gave me instructions to charge to Johnstone from that time on, so keep his account separate so that he could straighten out his.

Q. During all the time that Cunningham and Austin acted trustees had you had transaction with W. H. H. Bowers?

A. Yes, sir.

Q. How long a period of time?

A. During 1882.

Q. Did you, at any time, in March, 1883, furnish items on account, to either of them, Mr. Bowers or Mr. Johnstone, for supplies and materials furnished?

A. I don't know when that was given there; that is, I don't think.

Q. I will ask you to look at this item, and see if this is account rendered by you to Messrs. Butler Johnstone and Bowers?

A. Yes, sir.

Q. This is an item of account, W. H. H. Bowers and Butler Johnstone to Elias Morris. That covers Bowers, Cunningham, Johnstone and the whole of them.

A. Bowers' account was presented——

(Marked Exhibit "44.")
Offered in evidence.

Q. I have one more question: The note you took from Butler Johnstone you carried it in the bills receivable?

A. Really I cannot tell; I am no book-keeper.

Q. Did you not so testify on the second trial of your own suit in Salt Lake City?

A. I don't remember.

Q. Didn't you testify in substance that it was carried to the bills receivable on your account?

A. I don't know that I did. I can't swear to that.

COURT: That what was carried?

COUNSEL: The note was carried to bills receivable in his books.

Re-examined.

By Mr. BROWN:

60 Q. Did Mr. Butler Johnstone say why he wanted this off account a new account? Did he say why you was to charge to this account?

A. Yes, sir.

Q. What did he say?

A. There was one account to Bowers, running from 1883——

—. ——?

A. He says, You can slide them into one of those that has a place on the book; it is the same thing from beginning to end.

Q. You was asked about this $5,000-note transaction—same date as your check?

A. 23rd of December.

Q. Was this before or after you had introduced Johnstone to the foundry company?

A. Oh, this was after.

Q. After you had introduced him? What become of that $5,000 note?

A. I turned it over to them when we compromised.

Q. At that time did you turn over any papers to them?

A. Yes.

Q. Do you remember what papers?

A. All the shipping papers, various papers, pay-rolls, and everything I had.
Q. Do you remember whether the reports of the assay was?
A. All.
Q. Where was that transfer made?
A. At your office.
—. ——?
A. Mr. Cunningham.
Q. State whether there was a large amount of documents?
A. About a wagon-load.
Q. Books of the company?
A. Yes, sir.
Q. What sized forms were those?
A. Quite a large ledger and cash book.
Q. How many of them?
A. Mining cash book—Mam-oth Mining Company—day book, and I think a journal.
Q. Did you see these books of the Mammoth Mining Company?
A. Yes, sir.
61 Q. In whose name were they kept?
A. Mammoth Mining Company.
Q. What dates were on them?
A. From 1882 to 1883—part of 1883.
Q. What office did Butler Johnstone occupy in Salt Lake City?
A. Mammoth Mining Company's No. 101.
Q. What office did Bowers occupy?
A. Same one.

Cross-examined.

By Mr. BENNETT:

Q. Mr. Morris, where were those papers, books—wagon-load—delivered to Mr. Cunningham?
A. At Mr. Brown's office.
Q. Do you mean the Bowers books?
A. Yes, sir.
Q. You said the company's books.
A. Company's books were all headed the Mammoth Mining Company.

Mr. STRINGER, recalled.

Q. You stated when I asked you what transpired on the 8th of June, "Mr. McIntyre then read a contract." You may state what was said.
A. At that time, on the 8th of June, 1883, Mr. McIntyre came over and brought a contract.

Objection. Immaterial and irrelevant. Overruled. Exception. Counsel makes one more objection.

COURT: Proceed, Mr. Witness.
A. In June, 8th, I think it was—on the 8th day of June, 1883,

quite a number of men were hanging around, expecting to find some report from headquarters—from the office at Salt Lake City by the train. At 12 o'clock Mr. Samuel McIntyre came down by the train, and called quite a number of the men together—can't say the number—a large number of men. I was there at the time. Had a talk, which was about the six concentrators. I asked one of these people—he told me he had a contract and was reading it to the men. I listened to it. He read the contract right there and said that the Mammoth Mining Company were not liable for the actions of Bowers and Johnstone. I spoke up, and I says, "Mr. McIntyre, have I been here for eleven months, and only now find out I have not been under the employ of the Mammoth
62 Mining Company." He smiled and says, "I suppose so."

Q. Was anybody else speaking to McIntyre or talking about these six concentrators?

A. I think there was.

Q. What did they say?

A. There was several spoke on that subject?

Q. How many men were there?

A. I don't know. A large number of men.

Q. Employees of the company?

A. Yes, sir.

Q. I want to ask you who was Litchfield.

A. Litchfield; he was boarding there at the time of Johnstone and Plummer, and was employed looking after the mill where the ore was crushed for the smelter.

Q. Superintendent of the mill?

Q. Was there a question—when there was some trouble about paying for the freight—just state that transaction.

A. If my memory serves me right, in the beginning or middle of November, I received a telegram from Ironton, from the station master there to see——

Q. Just state what you said to Cunningham.

A. I telegraphed Cunningham, I had received it to telegraph money for freight—$2.00. I had used two car-loads. Unless that was brought in, I would have to shut down the furnaces.

Q. What reply did he make?

A. He said, "That won't do. I will see to it." He went over to find McNorton's office; seen him. He said, "I will settle for this freight business now." He wrote out a check, I believe it was, and sent it up to Ironton. The return message was that "I could use it."

Q. I want to ask you one thing further. Were those castings you ordered, were they ever used in the construction of the buildings there that were being constructed?

A. Yes, sir.

Q. They went into the construction?

A. Yes, sir; I was there and put the castings in, with Mr. Morris' masons there.

COURT: Are those buildings there now, or furnaces?

A. I don't know. I have not been there in this last five years.

63 By Mr. BENNETT:

Q. I will ask you if those men were employees of the company.

A. Yes, sir.

Q. Do you mean that they were men at work there on the smelters, or on the property?

A. I mean that they were men working there as I was. They were claiming that they were working there——

COURT: I want to ask you if those men were engaged there on that work that you were?

A. Yes, sir, they were.

COURT: Did he say anything to you in that connection before he brought that contract there and read it at that time?

A. No, sir.

Q. Was any reason given to you?

A. No, sir.

By Mr. BENNETT:

Q. When was this transaction about the car—about when?

A. I think it was in November; I think it was in November.

Q. Don't you remember that it was when Cunningham was acting as trustee?

A. Time that we constructed the furnaces.

Q. Don't you know that it was at the time he was acting as trustee?

A. At the time he made that $2.00 check.

Q. Was it about the time that it was dated?

A. It is the time that Mr. Cunningham was there superintending the construction of the furnace-house.

Q. That was just before Johnstone came?

A. Must have been three weeks before.

Q. Did you on the trial of the case of Elias Morris against the Mammoth Mining Company, state, "I said to Cunningham I was out of coal, and unless I got some would have to shut down. The coal came, don't know how he arranged for it"?

A. I cannot say.

COURT: Did you state that on that trial?

A. I think I did.

Q. Did you on that trial, have a telegram you received, showing the date you spoke about the coal?

64 A. I had a telegram from Ironton. I produced the telegram at that trial. The date I don't recollect. I received a telegram from Ironton. I produced that telegram, I think, in court. I don't remember the date that was on it. I believe it was November.

Q. Was it December 5th?

A. I don't think it was. I don't recollect. I cannot be positive.

Q. December 5th or 6th?

By Mr. BROWN:

Q. At the time of this talk about the contract which was brought

by Mr. McIntyre, state whether there was considerable talk about it?

A. Yes, sir

Q. About their work while there?

A. Yes, sir, most of it.

Q. Did you take possession of these works immediately after that time?

A. I don't think the works was used by anybody while I was there.

Q. Do you know whether anybody took possession?

A. Shut them up; locked them up, but did nothing to them. Well, there was a force there that Johnstone brang up.

Q. Do you know what he was?

A. One of the workmen. I think he had done work there.

Q. Don't remember his name?

A. No, sir, I don't think of the name now.

Q. Was it Wilson?

A. No, I think it was Henson.

BENNETT: Would like to know whether he was one of the staff?

A. I don't know whether he was one of the staff. Mr. Wilson was a quartermaster (?).

Mr. BROWN: I think we will rest.

J. A. CUNNINGHAM sworn for defendant.

By Mr. BENNETT:

Q. You are acquainted with the Mammoth Mining Company?

A. Yes, sir.

Q. Member of it?

A. Yes, sir.

65 Q. In 1882 and 1883?

A. Yes, sir.

Q. Did you hold any official position? President of the company and director?

A. Yes, sir.

Q. I ask you to look at the paper I hand you, and especially at the signature, and state to the court by whom it is executed.

A. By Samuel McIntyre, William McIntyre, J. A. Cunningham, P. T. Van Zile and W. H. H. Bowers. Attested by Judge Boreman.

COUNSEL: What is the date?

A. January 7th, 1882.

COUNSEL: It is a contract for the sale of the bulk of the stock of the company.

(Marked Exhibit "45.")

Q. I now hand you a paper bearing the signature of William H. H. Bowers, bearing date January, 1882. Ask you by whom that was executed?

A. This is Mr. Bowers' signature, dated January 7th, 1882.

COUNSEL: It is an assignment of one-half interest of that contract to Butler Johnstone.

By Mr. BROWN: I wish it to be understood that they all go in under my general objection.

BENNETT: I offer the contract (assignment marked Ex. "46").

Q. State if you recognize the signature to the paper I now hand you.

A. I do. Samuel McIntyre, William McIntyre and W. H. H. Bowers. That is a modification.

(Marked Exhibit "47.")

Q. I now present to you a paper dated November 1st, 1882.

A. This signature is Samuel McIntyre and William H. H. Bowers, agreement.

(NOTE.—Supplemental agreement is marked "47.")

(Paper of November 1st, 1882, marked Exhibit "48.")

COURT: Was that contract registered?

A. That contract was not registered.

Q. I now show you another paper; state to whom it is
66 executed, and whose handwriting.

A. W. H. H. Bowers, H. A. Monroe Butler Johnstone.

COUNSEL: That is a one-third interest in the contract I have just read.

(Marked Exhibit "49.")

Q. This is a supplemental contract, dated 15th day of January, 1883—the matter of assignment, and negotiations for extension of time. Do you know the signature to that contract?

A. Samuel McIntyre, William McIntyre, J. A. Cunningham, H. A. Monroe Butler Johnstone.

(Marked Exhibit "50.")

Q. Here is an agreement between Bowers and Butler Johnston; by whom was that executed?

A. W. H. H. Bowers and H. A. Monroe Butler Johnstone. Dated 22d day of January, 1883.

(Marked Exhibit "51.")

Court adjourns until 7 o'clock.

Seven o'clock court resumes its session.

By Mr. BENNETT: I desire now to ask a few questions of the witness Pugsley by the way of cross-examination.

PHILLIP PUGSLEY, JR.,—recalled for cross-examination:

By Mr. BENNETT: Mr. Pugsley, have you the journal where you could put your hand on it?

—. ——.

Q. I will ask you to state whether any payment- were made upon the foundry company's account with the work on that contract.
A. Yes, sir. There may be a payment check of $500.
Q. Any other payment?
A. Not that I know of. There was a note that never was paid.
Q. Was there a payment of $500 cash one time besides the check?
A. No, sir, just the check.
Q. I will ask you to look on page 6, February, 1883, to Salt Lake Foundry Company. Signed H. A. Monroe Butler Johnstone. I will ask you if this is the check to which you have alluded.
A. Yes, sir, that is the check.

Offered in evidence.
67 (Marked Exhibit "52.")

Q. I will ask you to look under date of February 1, 1883, Salt Lake Foundry and Mining Company, endorsed, "Salt Lake Foundry and Machine Company." State whether that was received by the foundry company?
A. Yes, sir, I think that was received.
Q. On the account to which you have testified to?
A. It was received I think, before the note was received; paid on the account.
Q. It was paid to apply on the account?
A. It was never paid.

COURT: What is the amount of that note?
A. $1,042.
Q. Does that note cover the balance of your items, of your account, less that $500 paid?
A. Yes.

Note offered.
(Marked Exhibit "53.")

By Mr. BROWN:

Q. Have you any or all the shipping bills of which this was shipped to Tintic?
A. Yes, sir.

BROWN: I would like to introduce them in evidence to show the course of business.

COURT: Do those shipping bills show all the goods?
A. They are alike—substantially alike.

(Marked Exhibit "54.")
"Salt Lake, January 19th. S. L. F. U. C. Shipped to Butler Johnstone, Mammoth Mill, Tintic."

COUNSEL: I offer these in evidence.

No objection.
Marked "54."

By Mr. BROWN:

Q. Mr. Pugsley, did you yourself know of this promissory note?
A. Did I know?
Q. Do you remember the transaction yourself?
A. I don't know anything about the transaction; I seen the note afterwards.
Q. Do you know who brought it there?
A. I don't know whether it was Mr. Pierpont or Mr. Morris.
68 Q. Do you know whether it was returned or not?
A. I think it was returned.
Q. You think it was returned?
A. Yes, sir, I think so.
Q. That transaction was really made this time?
A. Yes, sir.
Q. Whether it was received on this account or not you don't know?
A. I don't think it was taken.
Q. Don't know whether it was on the credit of the account?
A. I don't know.

COURT: Was any credit entered on the book for the note?
A. I think there was a credit at the time; wasn't carried into the account.

ELIAS MORRIS recalled:

Q. You may state what you know in regard to that promissory note?
A. Mr. Pierpont had been to Johnstone to get some money on account. When Mr. Johnstone called in my office to pay some item, he had promised Mr. Pierpont to leave that check to give to me.
Q. That 1,042 dollars?
A. Yes, sir, the note I am talking about. The check is for $500. He left this at my office to give to Pierpont, and then Pierpont called, he took it and looked at it, he didn't think it was right, to accept a check on the bank there and then; he cashed it at the bank to see if they would accept it. They said "No." Brought it back, and it lay in my office for some time.
Q. Why didn't you give it to Butler Johnstone?
A. He had left.
Q. That was the day of his departure?
A. Yes, sir.
Q. Didn't see him again?
A. No, sir.
Q. Afterwards did you do anything towards offering it to those other gentlemen?
A. No, sir, I have nothing to do with the foundry.
Q. You didn't do business with the foundry individually?
A. No, sir.
Q. Although president, do not take any individual part?
69 A. No, sir.
Q. You say that remained in your office for some time?

A. It remained there, expecting to give to Johnstone when he came.

BENNETT:

Q. It is dated the 1st of February, I see. Did you notice the date?

A. Only the day Mr. Johnstone left.

Q. You noticed the date did you not?

A. I don't really remember.

Q. Did he leave before the first of March?

A. I cannot recollect when—what time in February he left.

Q. I understand you to say he left very soon?

A. I understand that he left very soon after that time; I don't recall exactly the dates.

Q. I meant to ask you this evening, how long did you know Mr. Cunningham at the time of these transactions?

A. How long?

Q. Yes, sir.

A. I know him since he was a boy.

Q. How long had you known the Mammoth Mining Company?

A. I have known it by the name of the Mammoth Mining Company ever since it commenced in business.

Q. Did you ever do business with them before Bowers became connected with the company?

A. Yes, sir.

Q. How long a time?

A. Three or four years.

Q. How long had you known the McIntyre boys?

A. Three or four years.

Q. You know that Bowers came from England?

A. Yes, sir.

Q. Did you ask Mr. Cunningham or the McIntyres, what connection Johnstone had with the business?

A. I relied upon Cunningham.

Q. Did you ever ask Cunningham?

A. Yes, sir.

I think however, he had been here a little while—I questioned him about it—the money was forthcoming that we expected,
70 and Cunningham told me that he thought Mr. Johnstone honest about the stock—was a millionaire and perfectly safe; had no doubt in his mind whatever. I have talked more as confidential man and neighbor. Relied upon him.

Q. You never asked the McIntyres?

A. No sir, I never talked with them much.

COURT: When was it you had that conversation with Mr. Cunningham you have just related?

A. Must have been somewhere in January. January 1883.

Q. In that conversation was there anything said with reference to the relation that Johnstone bore to the company?

A. No more than that they were in some kind of a scheme to dispose of the stock.

Q. Was there anything said by Mr. Cunningham in that conversation, which indicated to you the relation that Mr. Johnstone bore to the Mammoth Mining Company?

A. No, never explained.

Q. Nor the interest he had in it?

A. No, sir.

Mr. CUNNINGHAM recalled:

Q. You are one of the parties to the contracts that I read from; the J. A. Cunningham, representing certain stock of that company, who entered into the contract with Bowers on the 7th day of January, 1882?

A. Yes, sir.

Q. After the contract of January 7, 1882, was executed, what if anything was done with reference to the ground, and Mr. Bowers' connection with it under that contract?

A. I think there was a resolution of the board.

Q. Did he go into possession, or was he put into possession?

A. Yes, sir.

Q. State whether or not Mr. Bowers superintended the work about the smelters, and worked the mine, in pursuance of the contract.

A. Yes, sir.

Q. State what he did.

A. He commenced a few days after the contract was entered into; went down and took possession of the property; commenced making preparations for the construction of furnaces, as was required by the contract. Continued there along until he got them
71 finished. I think finished about the 1st of April, and commenced smelting. Continued right along working the property: the proceeds was deposited in the London bank under the terms of the contract, and things moved along in a quiet kind of a way until in May some time, when he was likely to fail about making the May payment. Then he asked for a modification, said that he could raise some money under certain conditions; wanted us to release some stock. We agreed to do so, and did release some. Later on, in August, he then made another complaint, that it was a difficult matter to get money from his friends in London. He asked a further modification, and we also consented to that, and he made a payment some time in August, and we released some more stock to him. He had got considerably involved, and Mr. Austin was in communication with the parties in London, as manager of the London Bank of Utah, and said that he had cables from London, that the parties there would advance money to construct furnaces on the condition that that money should be used with that express purpose. Asked that Mr. Austin take the management for to dispose of that sum of money for these new furnaces.

Q. Was that before or after the execution of the contract of December 2nd and November 1st?

A. Before the contract was executed for November, 1st.

Q. You say you had this talk with Mr. Bowers and Mr. Austin about raising money to move, before that contract was executed?

A. Yes, sir. Mr. Austin then showed me a cablegram; what purported to be a cablegram; stating that they would advance 1,000 pounds a week towards the construction of those furnaces. Asked me to take the management of the affair.

Q. Had you known of Johnstone before that?

A. Only from Mr. Bowers. He said at the time that November contract was made, that he was looking to a gentleman that had advanced him $55,000, who was to have a one-third interest. So I consented to assist Mr. Austin with the management of the construction of those six different furnaces.

Q. Until what time?

A. Until December 2nd.

Q. Until Johnstone arrived?

A. Until Johnstone arrived.

Q. When did you commence?

A. First of November or second; I went down the second
72 or third of November. I was backwards and forth until the 2nd of December.

Q. Acting how, and for whom?

A. Acting as trustee for this sum of money that was sent here.

Q. Was the money actually sent?

A. Yes, sir.

Q. To whose credit?

A. All I know was that it was paid to the credit of Austin and Cunningham, trustees. I drew against that fund as one of the trustees.

Q. You did the work outside?

A. Yes, but I think I drew a few checks to some parties there in Salt Lake.

Q. In doing your business as trustee, what did you do in a general way?

A. The first thing that came up was to make arrangements with some one to construct the furnace building. Mr. Morris being a man in that line of business—one or two other parties spoken to about the matter—and asked for bids. Mr. Morris bid, I think, $4,200. One had a bid of about $3,580, and another of $3,850. Mr. Austin said that Mr. Morris being a man here in business, I concluded to give him the job.

Q. When you were talking to Mr. Morris with regard to this bid, what communication did you make about the character you were in?

A. I said to him that I had a contract with Mr. Bowers to sell our stock to him, but that from information from England from the member that would assist with Bowers, they were not disposed to advance any more money until they knew what was being done with it; that he had represented to them that he was making profits at one time, and another time that he had lost, and felt doubtful about advancing more money from England. They had consented to advance money enough to construct those six. I asked him to go and see Mr. Austin, as he could give him more general details than I could give. Mr. Austin said to me that Mr. Morris had

called upon him and talked the matter over. Mr. Morris left his bid with him.

Q. Did you have any other talk with Mr. Morris in regard to that trusteeship?

A. I said to him that after we had arranged on the contracts,
73 in case the money didn't come, we would let him know any time—we can pay him up to date and stop the work. That was the main reason the contract was drawn up.

Q. How much money was deposited at the time you took the trusteeship?

A. $12,000. Mr. Austin said $12,000.

Objection.

Q. You don't know yourself?

A. No, sir.

Q. What did you do in pursuance of that arrangement?

A. Mr. Morris sent his men down——

Q. State what you did yourself, what Mr. Morris did.

A. I stated to Mr. Morris about the 25th, I think it was the 20th or 25th of November, 1882, when I had been informed that the last draft had gone to protest, but that Mr. Butler Johnstone had arrived at New York and was on the way to Salt Lake. And that Mr. Austin said that he would personally guarantee the amount of $250,000 if he would continue the work until Butler Johnstone arrived. Mr. Morris said, I suppose that would be all right. I stopped all their work at the furnaces, and no one was working after the 20th, except Mr. Morris' men, until Mr. Johnstone arrived.

Q. During the time this was going on, before Johnstone arrived, did you receive bills from Salt Lake City, upon him yourself?

A. Yes, sir.

Q. In what capacity did you act?

A. I said to Mr. Morris that all supplies for material that he furnished under this contract was to be charged to Austin and Cunningham, trustees; and I would draw him a check from time to time.

Q. You explained who you was trustee for, who acting for?

A. Yes, sir.

Q. Well, did any other business transaction take place between you and Mr. Morris up to the time that Butler Johnstone arrived?

A. I cannot tell anything further.

Q. You may state, Mr. Cunningham, when Mr. Johnstone arrived at Salt Lake.

A. He arrived on the 27th day of November, and went to Tintic I think on the 30th day of November.

Q. When did he return from Tintic, if you know?

74 A. My impression is that he came up—21st of December.

Q. You were in Tintic when he came down?

A. Yes, sir.

Q. State what you did with reference to continuing the work.

A. I stated to him what I had done in a general way; I would now like to turn the property over to him. Asked if I would con-

tinue a few days longer, so that he could get to question into the works what was to be done.

Q. Did you know who Mr. Johnstone represented?

A. Only from hearsay.

Q. Did you turn the work over to him?

A. Not just at that time. On the 5th—either the 4th or 5th of December, he said that he would now take charge of the works himself. A few days after that he wrote me a letter and asked me to go and see the parties that I had got material from for the construction of those furnaces.

Q. Under what, if any contract, did he take charge of the work?

A. Took charge under the contract of November 1st, so far as I have any knowledge.

Q. State whether or not he took charge for the company.

Objection; witness'es conclusion. Overruled. Exception.

A. No, sir, he did not.

Q. To go back a little—how long have you known Mr. Morris?

A. Something like twenty-five years.

Q. State whether to your knowledge, during 1882, and before you took charge, you had any conversation with Mr. Morris with regard to the construction.

A. No, sir.

Q. Have any conversation with him in regard to your relations with Bowers?

A. Not after that.

Q. When did you have any conversation with Mr. Morris about Bowers, or Butler Johnstone?

A. About the 1st of November, 1882.

Q. Did you at or about that time say anything to him in regard to Mr. Bowers' connection with it before that time?

A. Yes, sir.

Q. State when you said anything and what it was.

75 A. It was at that time. I said to him, after he made the remark that Mr. Bowers was getting some little stuff from him and was owing him a small balance. I think I said that everything seemed favorable, that Mr. Bowers would be able to meet all those obligations soon; these six furnaces was to be constructed out of money from England, under the direction of the London bank. Enable him to meet all his obligations as he went along; and that Mr. Morris must risk to get his pay.

Q. State what, if anything, Mr. Morris said to you.

A. I will continue Bowers' claim.

Q. From that time until the crash came how often did you see Mr. Morris?

A. Every week or so, but didn't have many conversations with him.

Q. You resided in Salt Lake and he resided in Salt Lake?

A. Yes, sir.

Q. When after that time did you have any conversation with Mr.

Morris about Mr. Bowers and Johnston or both, with regard to the works at Tintic?

A. Conversation with him once in the London bank.

Q. About when was that?

A. My impression is that it was in the fore part of January. I went into the bank to draw a check for some money, and saw Mr. Morris standing up by the counter. Mr. Austin had the contract of November 1st, right across the counter; pointed out some parts of the contract and read it to Mr. Morris.

Q. What was said in that conversation?

A. I don't think there was much said about the contract. The most we had the conversation about was what they were doing in Tintic, how they were getting along.

Q. Did you have any conversation in regard to Bowers and Johnstone in relation to the work there after you went out of the bank?

A. I had a conversation outside there—how they were getting along.

Q. Did you have a conversation with Mr. Morris on that special subject?

A. He asked if I knew who the parties were that were assisting Butler Johnstone. I only knew from Austin. Mr. Austin
76 had said he understood who some of the parties were all—from information he got—they were men of large means, and abundantly able to carry through any enterprise they saw fit to take hold of. And from reports here he said the man, he said, had made a reputation of doing business; that from information I had received, I felt very sure Butler Johnstone would be able to carry out their contract, and everything would go through and be all right.

Q. Any further remarks with Mr. Morris on that subject?

A. Seems like there was another——

COURT: What was the date of that conversation?

A. Latter part of January, 1883.

COURT: Now, in this conversation that you have related as having occurred between you and Mr. Morris, was it with reference to his work that the men were doing there at the mines?

A. No, sir, not especially. With regard to what was being done in a general way.

COURT: Was it in regard to his interest in what he was doing, specially in reference to him personally—the work he was doing there?

A. I don't think that I exactly grasp your idea.

COURT: You have said that he was employed to build those furnaces; had he then completed his work?

A. I don't know; I didn't say so.

Q. So you can't say whether this conversation was as superintendent of the work he was doing at the mine?

A. No, sir.

Q. There was a conversation you had before that with him?

A. Yes, sir, I had a number of them. One I have not referred to.

By Mr. BENNETT:

Q. When was that?

A. I think on the 6th day of December Mr. Morris spoke to me on the street, near Wells, Fargo & Co.'s bank; said that Mr. Butler Johnstone requested me to call at his office—Morris' office, O. K. an account and he would pay it. I just O. K.d one bill and left it in the office, and the duplicate I brought with me, and left that with Mr. Austin in the bank.

Q. Was that the one I introduced to-day?

77 A. Yes, sir.

Q. You had O. K.'d that bill and left it with Mr. Morris' book-keeper?

A. Yes, sir.

Q. This?

A. Yes, sir.

Q. Was that for Mr. Morris' works?

A. He would get his money for it.

Q. Just state all the facts that occurred between you.

A. A few days after Mr. Butler Johnstone gave me a little letter, or note, thanking me kindly.

Q. Have you that note?

A. Yes, sir.

Q. Give the date it was sent.

BENNETT: I will introduce that note in evidence.

BROWN: I think it is hearsay.

Overruled. Exception. (Marked Exhibit "55.")

Q. Anything further in that conversation?

A. There was not very much said at the time, that I can call to my mind.

Q. It was the occasion you O. K.'d the bill?

A. No, sir, a few days after that. I think it was on the same day, the day following, that I got this note, that I went to Mr. Morris' about other business.

Q. Can you recollect any other conversation you had with Mr. Morris about this matter—about Butler—about the contract, under which this money was expected to be sent from England?

A. Can't call to mind just now.

Q. Did you know that Mr. Morris was president of the foundry company?

A. Only from common report.

Q. Did you know any other person connected with the foundry company?

A. Yes, sir.

Q. Did anybody else connected with that foundry company ask you how the Mammoth Mining Company was producing this material?

A. No, sir.

Q. Subject was never suggested?

A. No, sir.

Q. From first to last?

78 A. No, sir.

Q. When if at all did you think they were furnishing these goods to the Mammoth Mining Company?

A. At the time they commenced this suit.

Q. Who was Mr. Pierpont?

A. Superintendent of the works.

Q. Witness has stated to-day that you paid off certain pay-rolls, of the men—all the men?

A. No, sir, I did not.

Q. State to the court whether or not you ever took any pay-roll while Bowers and Johnstone was there.

A. No, sir.

Q. Pay-roll of furnaces?

A. No, sir.

Q. State whether you ever paid off the men or took checks——

A. Some time in August 20th, or 25th; Mr. Bowers came to me and said he was in very close straits, and asked me if I could lend him money until he got some from England. If I would take up the checks for a few months it would enable him to go ahead. I said that I would do so, and I checked down $1,750 from my own private account. I said I would take up the time-checks for a certain month. Some parties had sent their checks for collection, and they asked me to wait until they could send to Salt Lake and get the checks returned and get the money. I waited two days to check up what I could count off—about $1,000, and left the balance of the money with Mr. Pugsley. Bowers asked me to take up the bills for the month. Some time after Mr. Bowers paid me all the money and took his checks up.

Q. This was a personal accommodation of yours to him?

A. Yes, sir.

Q. Another witness said—I think, perhaps, the same witness—I will ask you to state whether within any time while this work was progressing under Johnstone and Bowers, you saw any pay-rolls upon which the company name and signature appeared—the heading of pay-rolls.

A. No, sir.

Q. When did you see these pay-rolls headed Mammoth Mining Company?

A. I think it was—pay-rolls and vouchers—some time

79 about the 1st of April, 1882.

Q. 1882?

A. Yes, sir. Mr. Samuel McIntyre called my attention to it, about the same time that we consulted with our attorney, and he gave some explanation why he had done so. We forbid him using the name of the company in any shape or form; he said that he would do so no more.

Objection as hearsay.

WITNESS: And after that I didn't see any vouchers with the Mammoth Mining Company's heading on it.

Q. When did you find that—the first time there was any pay-rolls used by Bowers and Johnstone?

A. I think, probably, after the works were shut down.

Q. The same witness testified about a coal transaction: Ask you if any such thing occurred to your knowledge?

A. No, sir.

Q. He referred to it in a former examination, and at that time he had a telegram that he showed to the court—it was either the 5th or 6th of December?

A. I wasn't in Tintic at all.

Q. You had communication in regard to coal; did you have in any way any transaction with regard to coal?

A. Don't know.

Q. You say you returned to Tintic?

A. When our trusteeship expired on the 1st of December.

Q. Can you state that definitely? State to the court how you are able to fix that date.

A. Where I drew checks on the 4th, 5th, 6th, 7th and I think 9th, almost every day I drew checks.

Q. Drawn where?

A. In Salt Lake City.

Q. You can say that you was not in Tintic on the second. Ask you when you went back to Tintic?

A. Didn't go back until — with Mr. Goodheart.

Q. Then I understand that you went there after Johnstone took charge?

A. I was down there for a day or two before I quit, but when I returned, didn't go back any more.

Q. Did you hear Mr. Grow testify on the stand?

A. Yes, sir.

80 Q. About a transaction about lumber?

A. I don't know anything about the conversation; have no recollection of it.

Q. He said you were on the platform of the car. Did you have any such conversation?

A. No, sir.

Q. You have produced papers connected with the reign of Bowers and Johnstone during the construction of those works, and the management of them and the mine?

A. Yes, sir.

Q. Ask you when did you get all of them?

A. Some time—over a year—after the shutting down of the works, Mr. Bowers was then going to move to California and Judge Harkness advised me——

Objection as hearsay.

COURT: I suppose he wants to say that he had been advised to get the papers.

A. I went to see Mr. Bowers and said that we would like to get possession of them.

Q. You got the papers of Mr. Bowers?
A. Returned them when called for.

Objection.

Q. Now state as well as you can what papers you got from him.
A. Some books—two large books, and 600 or 700 vouchers. A lot of other papers that were scattered all around; don't know how many there was, or what they was. I got 600 or 700 vouchers, and a number of bills.
Q. Had you ever before that time seen or had known of these vouchers at all?
A. No, sir.
Q. Had the Mammoth Mining Company had the use of them?
A. No, sir.
COURT: How do you mean?
COUNSEL: The corporation—members of the Mammoth Mining Company.
Q. State whether they had ever been to the company's office subject to *to* the inspection of the Mammoth Mining Company, or any of them except Bowers.
A. Not any of them except Bowers.
COURT: Do you know whether any of them was used?
81 A. No, sir, I don't know. To my knowledge they were never presented to the board of directors while I was there.
Q. State in a general way what vouchers you received—you say books and vouchers?
A. Yes, sir.
Q. Checks?
A. Yes, sir.
Q. $1,000 and $1,500 checks?
COURT: He has already said that some were of those received.
Q. Mr. Cunningham, did you ever return to Mr. Bowers the documents, papers, or books you received from him, or any of them?
A. Yes, sir, I did, quite a number.
Q. What portion?
A. I returned the books and quite a number of the vouchers. I don't remember what all he did get at the time—he had a suit with the London Bank of Utah. From that time to this he has never returned them to me—around first one place and then another.
Q. You have never had possession of the books since?
A. Mr. Brown and Sutherland were Mr. Bowers' attorneys in this suit—they had possession of them—I don't know how long.
Q. So you haven't them in your possession, and never have had?

COURT: I understand you to say you have never seen them since.

A. Oh, no; I have seen them in court, but never in my possession.
Q. State whether or not the Mammoth Mining Company had an office in Salt Lake City, during 1882 and 1883?
A. No, sir, they did not.

Q. It is not true then that the Mammoth Mining Company had one when Mr. Bowers had his?

A. Mr. Bowers' secretary kept the books there; that is the books the secretary has charge of.

Cross-examination by Mr. BROWN:

Q. Did you ever see that notice?

A. I suppose so.

Q. You met in pursuance of it; didn't you elect directors?

A. Yes, sir.

82 BROWN: I offer that as a part of the cross-examination.

"The annual meeting of the stockholders of the Mammoth Mining Company will be held at the office of the company, 101 Salt Lake City, Tuesday, November 26th, at 2 o'clock p. m., James A. Cunningham, president."

COURT: Did all of the directors of this corporation live in Salt Lake City?

A. Yes—no, I am mistaken. Samuel McIntyre didn't live there.

Q. Did Bill?

A. Yes, I think he lived there.

Q. Another notice; I will ask you if you saw that?

A. Yes, sir.

BROWN: I will offer that for the same purpose.

Argued.

"Stockholders' notice.—The annual meeting of the stockholders will be held in the office of the company, 101 on Tuesday, February 22d, 1882, James A. Cunningham, president, W. H. H. Bowers, secretary."

Q. This same room 101, that Mr. Bowers was at?

A. Yes, sir.

Q. Was Mr. Corker, now your secretary *pro tem.*, secretary at that time?

A. I think he was.

Q. How many rooms did Mr. Bowers use there?

A. I think three rooms.

Q. How often were you at the rooms?

A. Sometimes three or four times a week; probably would be a week or two, won't be sure.

Q. How often did you meet with the McIntyres there?

A. Very seldom.

Q. You have met there?

A. No, sir.

Q. At the time of the conversation in the spring of 1882, didn't you meet there?

A. No, sir.

Q. Didn't you in February?

A. No, sir.

Q. Didn't you testify on a former trial that you met there and discussed it?

A. I think not.

83 Q. How much money did Mr. Bowers pay you on the contract?

A. $25,000.

Q. That all he paid you before you modified the contract?

A. He paid $15,000 in May.

Q. That is all you received up to and including the 1st day of November?

A. Yes, sir.

Q. After that how much did you receive for stock?

A. It was about the 11th or 15th of April. Somewhere along there.

Q. How much?

A. $35,000.

Q. Any other?

A. No, sir; that is all.

Q. That makes it $170,000 in all that you got?

A. Yes.

Q. Mr. Cunningham, you swore, in the spring of 1882, Bowers was doing business in the name of the company?

A. Yes, sir.

Q. Did you say you saw a pay-roll?

A. I don't know whether it was a pay-roll or a time check.

Q. Mr. Bowers told you he was using the name of the company?

A. He said at the time he had a right to.

Q. Under the construction, that he had a right to?

A. He had a right to represent his own company; that he was going to purchase the property of the Mammoth Mining Company.

Q. There was but one Mammoth Mining Company, was there?

A. No, sir; that is all that I know of.

COURT: Do I understand you to say that he claimed the right to use the name of the company by the remark that he was a purchaser,—that he was going to purchase the company?

A. No, sir, he claimed he was a new company; that they had no connection with it. That the new company would be of the same nature. He was going to add "Smelting Company"—"Mammoth Mining Mill and Smelting Company."

Q. I don't know exactly what you mean.

84 A. I am speaking in relation to the Mammoth Mining and Smelting Company. He was using name.

Q. He was using name of the Mammoth Mining Company?

A. Yes, sir.

Q. That is what you found out?

A. Yes, sir.

Q. Did you know it?

A. Well, at the time he said he had a right to use the name of the company.

Q. When did Mr. Bowers personally cease to take active part at Tintic?

A. I don't really know.

Q. Do you know of his doing anything after November 1st?

A. He was there off and on during the time I was there.

Q. How long were you there during November?

A. Half the time.

Q. Was the work going on under his direction in November?

A. He had charge of the work.

Q. Mining and mill?

A. Yes, sir.

Q. Were there workmen there under his direction?

A. Well, if——

Q. Don't you know whether there were or not? Were there workmen at work there during the time—in November, 1882?

A. Yes, sir.

Q. How many men were at work in November, 1882?

A. Well, I suppose 30.

Q. At the mills and construction and all?

A. That was at the furnace and the mill, he had probably eight or ten men working at that new furnace.

Q. Morris had how many?

A. Probably ten or fifteen men.

Q. Didn't he have nearer thirty?

A. No, sir, I don't think he had.

Q. You had a gang and he had a gang of men. How many at the mine?

A. I don't know; I wasn't up to the mine.

Q. During that time?

85 A. I don't recollect at that time.

Q. During November, was there any change in the possession of the premises?

A. No, sir.

Q. No change in the management, nor any indication of a change?

A. No, sir. Not outside of these new furnaces I was constructing.

Q. Did you state to Mr. Bowers the arrangement you had made with Mr. Morris?

A. Yes, sir.

Q. Whom were you trustee for at that time?

A. My understanding, for Butler Johnstone and his associates in England.

Q. Did you know Butler Johnstone at that time?

A. No, sir.

Q. Did you understand he was a partner at that time?

A. Had I understood that he was a partner at — time?

Q. Yes, sir. Do you remember me asking you that question on the second trial of the Morris case against the Mammoth Mining Company?

A. I don't recollect.

Q. Didn't I ask you that?

A. I don't know that I understood it in that way.

Q. Did you understand me in just that way; that you didn't know who the man was—the person was—who the person was, you can't say?

A. I think I answer that. I didn't know the money was there, because I didn't see it.

Q. When did you first know of this assignment from Bowers to Butler Johnstone?

A. I don't know about the assignment as it is here. I don't know.

By Mr. BROWN:

Q. You told Mr. Bennett you didn't know of it at the time. When did you hear about it?

A. I am under the impression that I got it in London.

Q. When?

A. In the fall of 1884–'5. I got the contract and assignment of the contract from Mr. Goodheart; which one it was I am unable now to say.

Q. Did you have—you have it on the trials in this case.

86 All those trials, those papers have been obtained from whom? Do you know who the reporter was?

A. Adam Patterson. Second I think Patterson was. Third, McGurrin.

Q. Isn't it true that you never produced this assignment until the time McGurrin reported the trial?

A. I don't know, unless the reporter's marks are there.

Q. If there is any exhibit marks by Patterson, wish you would show me. It was long afterward you knew of this assignment?

A. They got some papers from the London bank, it may be possible that they came with them—might have been mislaid.

Q. When you were in London, 1885, after the trials of the Morris case?

A. Before any of the trials.

Q. You think you got something of the kind?

A. I think I got something of the kind from Mr. Goodheart; we got some papers from the London Bank people, after we got through with the other suit between them and Bowers.

Q. After Butler Johnstone came here did you have any further consultation with Bowers as to the management of the business here?

A. I don't think I did.

Q. How often did you see Butler Johnstone with regard to it?

A. Well, not very often.

Q. What was the date of that cablegram about November 1st?

A. It was probably about a day or so before he showed it to me.

Q. When did he show it to you?

A. My impression is that it was in the middle of October.

Q. Did you show that cablegram to Mr. Morris?

A. No, sir.

Q. Who sent it?

A. I don't remember now.
Q. Did you know—did you ever know?
A. I may have known at the time.
Q. Was it signed by a name—a fictitious name?
A. The cablegram was in cipher.
Q. All you know was what Austin told you. Was the
87 whole cablegram in cipher?
A. I think it was.

Mr. CUNNINGHAM:

Q. I believe it is said that this thing went to pieces on or about June, 1883, by that is it meant that those parties failed to perform their contract, and the property thereby reverted to the original owners?
A. Yes, sir.
Q. Did the company go and take possession of the property?
A. Yes, sir.
Q. Been using and running it ever since?
A. Yes, sir.

By Mr. BROWN:

Q. When was it you told Mr. Morris that Bowers would be able to pay?
A. It was about the 1st of November.
Q. Before or after the execution of the new contract?
A. Might have been a day or two before—a day or two afterwards—just about that time.
Q. He had been prior to that considerably in default in his payments?
A. Yes, sir.
Q. What new fact was there, that made you think that he would, may be, be able to pay any better?
A. Only from information from Austin.
Q. Nothing but that Mr. Bowers told you?
A. He reported the same thing; that these parties would come to his rescue.
Q. Was this before or after this contract?
A. It was during the conversation we had—we had, probably, two or three conversations; it was in one of these—I am not sure when it was.
Q. You say you went into the bank one time and saw Austin read out something to Mr. Morris? Didn't you take that paper into your hand?
A. No, sir.
Q. Did you hear him read anything of that?
A. I heard him mention the refinery.
Q. Did you hear him read any part of the contract?
A. I am not able to state what all was said.
Q. You heard the word refinery?
A. Yes, sir.
88 Q. How close did you see the paper?

A. Probably six feet off.
Q. Looked over the shoulder of either of them?
A. Over the shoulder of Mr. Morris.
Q. What sentence did you hear?
A. I didn't notice any sentence.
Q. Did you read any of that document?
A. No, sir, I didn't read it.
Q. Was it in an envelope or rolled up?
A. Folded up—just about as it is now.
Q. In an envelope?
A. No, sir.
Q. Was it put in an envelope?
A. I don't remember about that. After putting it away I commenced talking with Mr. Morris. Mr. Austin went back with the contract.
Q. When was it you had this talk with Mr. Morris about who was assisting Mr. Bowers and Johnstone?
A. Some time in January.
Q. Who did you tell who was assisting him?
A. Mr. Austin said Montgomery Walker, with Lord Fitzgerald and Mr. Goodheart.
Q. Did you hear Goodheart's name about that time?
A. Yes, sir.
Q. Did you hear Montgomery Walker's?
A. Yes, sir.
Q. Was you apprised of the account being run at the foundry at any time?
A. No, sir, never know of it.
Q. Didn't you have any talk with Morris as president of the foundry company?
A. No, sir.
Q. In any of those talks did you say whose interest he was looking after?
A. I don't know that there was any expression of that communicated.
Q. You say you read that letter to Mr. Morris?
A. Yes, sir.
Q. Who was present when you read that letter?
A. Mr. Morris.
Q. Anybody else?
A. No, sir.
89 Q. Do you know his book-keeper?
A. Yes, sir.
Q. Didn't you swear on the first trial of the case of Morris against the Mammoth Mining Company, that Mr. Juke, the book-keeper, was present?
A. I believe I said that Mr. Juke came in.
Q. Didn't you swear on the second trial, and third trial, that Mr. Juke was present?
A. I think I said Mr. Gianke came in to answer something.

Q. Mr. Cunningham, do you know a man by the name of H. Sebree?
A. Yes, sir.
Q. What is his business?
A. I don't know what he is doing now.
Q. What was his business when you knew him?
A. He was in the wagon and implement business. I don't know what he is doing now.
Q. Did you have a talk with him about this contract with Bowers?
A. Yes, sir.
Q. When?
A. I think it was on the 1st or 2d day of February.
Q. 1883?
A. Yes, sir.
Q. Whereabouts?
A. In his office.
Q. Did he ask you why you hadn't published that contract before?
A. I don't remember now.
Q. Did you tell him you were going to publish the notice in regard to this contract with Bowers?
A. Yes, sir.
Q. Did he say to you that you should have published it before?
A. I don't remember; he might have — so. I believe he said something of the kind.
Q. And in reply to that did you say that Butler Johnstone objected on the ground that it would injure his credit?
A. No, sir.
Q. Mr. Cunningham, after the last trial of the Morris case Morris against the Mammoth Mining Company—you compromised
90 and settled up after that case?
A. Yes, sir.
Q. Didn't you stipulate that Mr. Morris should turn over all the papers of which he had control?
A. I don't know what the attorneys did.
Q. Did you?
A. I don't know.
Q. Didn't you come over to my office to get them?
A. Didn't go over for the purpose of taking them away.
Q. Wasn't that in pursuance of a part of the agreement that you should have those papers?
A. Yes, sir, I think it was.
Q. Now, at that time, weren't those books brought out and laid on the table of my office?
A. Yes, sir.
Q. Three books, in the name of the Mammoth Mining Company?
A. There wasn't three of them; I think two.
Q. Didn't you take those away?
A. No, sir.
Q. Didn't you take away from there the pay-rolls?

A. Took three or four.

Q. Didn't you take away a large amount of their vouchers?

A. I think you have got a good deal of them yet. I called on Mr. Williams a few days afterwards—that one with Mr. McIntyre's name on—we never had got.

Q. What was that?

A. One you used in the former trial.

Q. What McIntyre?

A. Either Samuel or William; I think it was Samuel McIntyre's. I called on Mr. Williams a day or two afterwards. I asked him, he said he had looked through his papers, and could not find anything.

Q. Now, at that time you took the papers, were we there—Mr. Morris and myself?

A. Yes, sir.

Q. Some of them just came over out of the trial?

—. ——

Q. They were in the drawer in the center of the large table?

A. Some in envelopes on the edge of the table.

Q. In the south room?

91 A. I think the large room. My impression was that the books were in the very room; may have been in your office, but I didn't take them.

Q. Where is that check book that shows that—was in December, 1882?

A. My check book is at home.

Q. What kind of a check book is it?

A. Just an ordinary book—check book—payable on the London bank.

Q. Was the cover in your book one like this?

A. Yes, sir.

Q. You say you went yourself up to Boulder Springs?

A. Yes, sir.

Q. You wasn't there at all, were you?

A. When?

Q. It was about the 12th or 14th of November?

A. I think I went in a buggy.

Q. You swore on the last trial that you wasn't there at all, didn't you?

A. I don't remember about that. I think not. My recollection is that I went from Mose Yebo (?) to see about getting some lumber.

Q. You spoke about these vouchers and pay-rolls not being shown to the board of directors. Was there any meeting of the board?

A. Yes, sir.

Q. Was there any meeting——

A. About the time they were shutting down, I think there was a meeting then.

COURT:

Q. Mr. Cunningham how long had this Mammoth Mining Company been in operation prior to 1882?

A. As a corporation, about a year; as tenants in common, 5, 6 or 8 years.

Q. By the same name?

A. Near about the same. The Morgan Mammoth, and the Mammoth Morgan, one name, and sometimes three.

Q. After it was incorporated—it had been running six or seven years before this?

A. I think about eight years.

Q. Was it a mine well known in the country?

A. Yes, sir.

Q. Had done considerable business?

92 A. Yes, sir.

By Mr. BROWN:

Q. What had been its annual outputs in the years before?

A. I am hardly able to say. Several hundred thousand tons. Possible—the year 1881, the output was considerable—100,000 tons.

Q. You mean gross?

A. Yes, sir.

Q. When was the first discovery there?

A. In 1878.

Q. What was the output in those days?

A. I think in 1878, it was 200,000 tons.

Q. The general nature of the ore is copper, gold and silver?

A. Yes, sir.

By Mr. BENNETT:

Q. You spoke of the payments made by Mr. Bowers and Johnstone under this contract, what sum did you say had been paid?

A. I don't remember; it ought to be $170,000.

Q. Ask you if stock was issued at the price named in the contract?

A. Yes, sir.

Q. The money was paid for the purchase of stock, and the stock delivered?

A. Yes, sir.

COURT: Then those people own that stock of the company?

A. Yes, sir.

Q. These same people?

A. Parties we have sold to.

Q. That stock purchased by different persons at the solicitation of Mr. Bowers?

A. Yes, sir.

Q. State to the court when Bowers failed, the mine was of greater or less value than when the contracts were made.

Objection.

Q. As to the grounds; I confine you to that—more or less val-

uable when the contracts were made. State whether when you got back the property with the smelters put up for the Mammoth Mining Co.

93 Objection.

A. Mining company never used the smelters. We used four furnaces for a short time.

Q. State to the court what was their value.

Objection.

A. No use whatever to the company. We have abandoned them.

Q. What has become of them?

A. They are standing there.

Q. Isn't it a fact that they are worthless?

A. They are worthless to the company. We will take 10,000 dollars for the whole plant. Even the mill we had there before they went there, they dismantled that.

Q. Who dictated the style, form and character of the plant and smelters?

A. Mr. Bowers, I think.

Q. Managing the mine, wasn't he?

A. He claimed to be.

Q. Didn't it do good work—as it purported to do the work of the mine, and separate the products?

A. No, sir, I think not.

Q. State whether a refinery is needed there.

A. No, sir, unless their works was connected with it, they didn't need it.

Q. I will ask your attention to the newspaper headed——

A. Yes, I remember the notice.

COURT: What paper is that?

A. Tribune, November 2d, 1883.

COURT: Read it.

Mammoth mine. We desired Butler Johnstone to state, that he is the representative of the new purchasers of the Mammoth mine, the vendors, etc.

(Marked Exhibit "56.")

Re-examination:

Q. When did Mr. Butler Johnstone leave?

A. First day of March, 1883.

Q. That check was not drawn on the funds of the Mammoth Mining Company. State what it was drawn for.

A. I don't really know. I know it would go to the Mammoth Mining Company.

(Marked Exhibit "57.")

COURT: No doubt this is a statement that witness made.

94 Q. I have here a multitude of vouchers and as many checks running through this management—showing the course of business.

One or two vouchers read to the court in same form as Ex. 29.

COURT: The court don't care to hear any more, simply for the reason that it seems to the court that that which has gone in is a fair representation of a large number here.

By Mr. BROWN:

Q. Were those vouchers, such as has been introduced here on our side, gotten up by the Mammoth Mining Company long before Bowers took hold?

A. No, sir; all gotten up by him afterwards.

COURT: What do you mean by that question?

BROWN: Whether it was some the company had left over, or gotten up by Bowers.

Q. For instance, here is a blank I have got. Were such blanks gotten up by Bowers afterwards and not by you?

A. My impression is we had something like that.

Q. Do you swear that you had these gotten up beforehand?

A. I am not swearing that we did or that we didn't.

Q. How many shares of stock was there for this $170,000?

A. I am not able to say that—could from the contract.

Q. What was the amount taken out—dollars and cents? Do you know?

A. I don't know.

Q. About how much?

A. Two hundred thousand or two hundred and fifty thousand.

Q. That was deposited to the credit of the company?

A. I think there was more than that.

Q. When you say those furnaces were worthless to the company you mean the company has not used them and let them go to decay?

A. Yes, sir, they still stand there.

Q. Have you any experience in refining?

A. No, sir.

Q. Any experience in copper-smelting?

A. Some little.

Q. When and where?

95 A. Right there on the ground, five or six years before that.

Q. It was by some other different system or plant?

A. Yes, sir.

Q. Had a number of Jack-Mormons there. Has this refinery ever been completed?

A. I don't know whether or not.

Q. This was by what?

A. It was by electricity. We had twenty-six jigging machines, and took all the gold and silver out by electricity.

Q. What you mean by them being worthless,—from the standpoint you don't know how to use them?

A. Don't know of anybody else who does.

Q. How do you know Butler Johnstone left the 1st of March?

A. I saw him and he said he was going——

Q. How long before that had you seen him?

A. Maybe a couple of months—early in February—13th—I won't be certain.

Q. Didn't you testify in the case of Austin against the Tribune Company, that it was about the 13th of February that he left?

A. No, sir, I think not.

Court adjourned till to-morrow morning 9 o'clock.

DECEMBER 4, 1888.

Examination of Mr. CUNNINGHAM continued.

By Mr. BENNETT:

Q. State to the court any part of that matte account, that went into and made up any portion of the money paid to you by Johnstone and Bowers.

A. Not to my knowledge.

COURT: Do you mean that no part of the output of the mine went in payment of the several sums due to the stockholders?

Q. Under the contract I observe that the expenses of working the mine, and all expenses, except the making of new furnaces, was to come out of the proceeds of the sale of matte. I will ask you to state to the court whether any part or all of the proceeds of the matte was used with these expenses.

A. Yes, sir, all used.

Q. State how that was done.

A. The checks were all drawn in favor of W. H. H. Bow-
96 ers, and a great bulk of the checks were left right in the bank with instructions to be placed to Bowers' credit.

Q. State whether those checks for expense account exhausted all the proceeds.

A. Should say, yes. I didn't have access to his bank account.

BROWN: That is just what I want him to understand.

COURT: Such transactions as came under your actual knowledge, is what Mr. Bennett is asking you to speak about——

Q. You drew the checks?

A. Yes, sir.

Q. You can state whether he exhausted it all or not.

A. Yes, sir.

Q. You checked it all out to Mr. Bowers on account of expenses?

A. Yes, sir.

By Mr. BROWN:

Q. How do you know how much the matte account was?

A. All I know was the amount placed to the credit of the company.

Q. How did you know it was?

A. Simply placed to the credit of the company.

Q. How do you know?

A. I was informed by the teller of the bank.

Q. If you don't know what the gross proceeds of the matte was, how do you know what the current expenses of the mine was?

A. From reports from Mr. Bowers.

Q. So that when you say that the expenses exhausted all the matte account, you form that opinion from what the teller told you?

A. My own knowledge, that the statement made out at the time of the Mammoth Mining Company account, showing the money was all drawn.

Q. These checks you drew, you drew to Edward Austin. Didn't after November 1st, ever give a single check to W. H. H. Bowers?

A. Well, I think they were all given. Some payable on the London bank.

Q. Didn't you say just now that you left a majority with the London bank?

97 A. Yes, some were made payable to the London bank. Sometimes I gave Mr. Bowers the checks myself.

Q. When did you?

A. During the fore part of the operation of the property.

Q. Did you, after November 1st?

A. Yes, sir; I have got checks with his endorsement on.

Q. I want to know if you gave any checks to him after November 1st?

A. Well, I don't know that I can be right certain on that; my impression is that I did give some.

Q. He was to give them to Austin?

A. Was the general rule.

Q. Were a large part of the checks made payable to Edward Austin?

A. No, sir; some of them was drawn payable to him.

Q. I want to ask you if Bowers had any interest in the Mammoth Mining Company prior to January, 1882?

A. Not to my knowledge. He was making a contract for part of the interest he acquired. He bought some stock.

Q. Before or after?

A. Just at that time.

Q. Who from?

A. Owen Dix.

Q. Some of that stock?

A. Yes, sir.

Q. How much did he buy of Owen Dix?

A. I think he had something over 7,000 shares.

Q. Same transaction?

A. Same date. A few days after the contract, I think it was, he bought N. Barnes' (?) interest. I believe the turn was made beforehand; the transfer was not made until some time afterwards.

Q. At the time of the second contract, November 1st, did Bowers have any responsibility outside of his interest in this contract?

A. I don't know. Don't know of his having.

Q. Do you know of his having any credit outside of that?

A. I don't know.

By Mr. BENNETT:

Q. Were you asked last year whether the $170,000,—that stock was turned at 187½ cents?

98 A. Yes, sir.

Q. For the whole amount?

A. Yes, sir.

COURT: When did Mr. Bowers' capacity as secretary and director of this Mammoth Mining Company cease?

A. At the request of the officers, in November, 1883.

J. FRED. CORKER recalled for defendant.

By Mr. BENNETT:

Q. You have in your hand the minute book of the Mammoth Mining Company. Turn to the report in regard to the transfer of the property. Please exhibit it to the court and read it.

Q. I ask you to refer to the motion of the board of directors touching the transfer of the property.

A. "Salt Lake City, Utah. January 1, 1882. Meeting of the board of directors was held at the office of W. H. H. Bowers, 101 Main street, 4 o'clock p. m. on the above date. President James A. Cunningham, Samuel McIntyre and Phillip T. Van Zile, secretary, appearing to be present. Resolution that the Mammoth Mining Company having consented to the carrying out of a certain contract, by and between James A. Cunningham, Samuel McIntyre and William McIntyre, that we authorize the transfer of the property, pursuant to the said contract. Resolution carried."

COURT: It seems that the effect was to make this Mammoth Mining Company a party to the contract. They agreed to the carrying out of this contract.

COURT: It looks, gentlemen, to me, that that made the company a party to the contract.

By Mr. BENNETT:

Q. In what business were you engaged in 1882, after January 7th, 1883, up to June, 1883?

A. Some of the time with W. H. H. Bowers.

Q. Had you been in that employ before 1882, about a year previous? In what capacity were you employed with Mr. Bowers in 1882–'3?

A. Clerk and book-keeper.

Q. Do you know Mr. Morris—Mr. Elias Morris?

A. I do.

Q. State whether throughout 1882 he had any business with Mr. Bowers to your knowledge.

99 A. He had in 1882 and 1881.

Q. Both?

A. Yes, sir.

Q. Were you familiar with the contract of 7th of January, 1882, between the stockholders of the Mammoth Mining Company and Mr. Bowers?

A. Part made by me.

Q. You are familiar with the terms of the contract. I will ask you if Mr. Morris furnished any material for use at the Mammoth works?

A. Yes, sir, he did.

Q. When did he commence furnishing materials to Mr. Bowers for that purpose, if you remember?

A. After Mr. Bowers had that contract; I don't recollect the date.

Q. Do you remember an occasion that you went to Mr. Morris' office and directed an order for material?

A. Yes, sir.

Q. State as near as you can any one occasion of that kind.

A. Yes, sir, in 1882, after Mr. Bowers had a contract from the company, we wanted fire brick and fire coal,—he sent me up with an order for it.

Q. Did you have an interview with Mr. Morris at that time?

A. Yes, sir, I had, at Mr. Morris' office. He objected to filling it. Mr. Bowers had an open account for material furnished for — Mr. Bowers being mechanical engineer at their construction. Mr. Morris refused to; he didn't want his goods to go out the same as the last time. I told Mr. Morris to go down to Mr. Bowers' office and see him in regard to this matter.

Q. Did he go there?

A. Yes, sir. Went down to Mr. Bowers' office, and Mr. Bowers and Mr. Morris talked about filling this order.

Q. Give what they said, if you can.

A. They talked over this matter, and Mr. Bowers explained it to him in regard to this contract with the company, and during the course of the conversation took the contract out of the safe.

COURT: When was that?

A. In the early part of 1882, first order that we took to

100 Mr. Morris to supply the works.

Q. State the month.

A. February or March.

Q. You said that Mr. Bowers exhibited to Mr. Morris the contract at that time. State more particularly about that. State whether you saw the contract or contracts.

A. I did. It was the contract—a copy of the original contract.

Q. Copy made by whom?

A. Copy made by myself.

Q. State the position of the parties, where they stood, and what by.

A. The place was a small room in the center of the second story—three offices. His desk was as that table is there, a safe on the right-hand side, and the desk I occupied was in front of Mr. Bowers' desk,

that they had the conversation. The matter had been discussed between Mr. Bowers and myself. He thought when Mr. Morris had sent his clerk down to collect the amount—Bowers was afraid Mr. Morris wouldn't fill the order.

Q. Now after Mr. Bowers was in there—state whether you saw Mr. Bowers hand out papers.

A. He went to safe and took out a copy of this contract.

Q. What for?

A. Read portions of the contract—to make his credit good with Mr. Morris, what he was driving at.

Q. Did you observe if Mr. Morris saw the contract?

A. Yes.

Q. Where did they stand?

A. At Mr. Bowers' desk. Mr. Bowers stood directly in front of Mr. Morris—one side.

Q. Well state from what—did you hear them confer, and if so, as near as you can, repeat what they said.

A. I don't know that I can state what they said there. They were talking, and I understood what they were talking about; I knew the contents of the paper, and knew what Bowers was explaining to Mr. Morris, that he would get paid for the material furnished.

Q. Do you know Mr. Stringer?

A. Yes, sir.

Q. Did you have any arrangement in engaging him to go
101 into these works?

A. Yes; Mr. Morris came and told me that he was a good smelter man, just the thing Mr. Bowers would want—wrote to Mr. Bowers in regard to that—and when he came back he sent him down with the orders to take.

Q. Did you see Mr. Stringer?

A. Had a long conversation with him in regard to this matter; wanted to know what the per cent. was—how much.

Q. Did you state who wanted to employ him?

A. Told him that Mr. Bowers had a contract with the Mammoth Mining Company, and wanted to get a man to take care of the furnaces?

COURT: What is the objection of this?

COUNSEL: I understand he was simply an employee of the company.

Q. I will ask you to look at two checks, being part of Exhibit 34. I want you to explain to the court why his name appears on some checks and not on others.

A. Mr. Bowers had two bank accounts, personal account and an account he was running under this mining deal.

Q. Expense account?

A. Yes, sir.

Q. The first checks he checked off was W. H. H. Bowers, manager?

A. Had a statement made.

Q. Against what funds?

A. Against the funds for the matte account. Cunningham drew the matte account out and put it to the credit of Bowers.

Q. The check when not countersigned was on what account?

A. On his private account.

By Mr. BENNETT:

Q. Have you knowledge about any other interview between Mr. Bowers and Mr. Morris in regard to this contract?

A. Mr. Morris was up a great many times in the office making inquiries about Mr. Bowers, and of other parties, Mr. Pussey, and all those who were there.

Q. He inquired about how things were going on at Tintic? Nothing special about this contract?

A. No, sir.

102 Q. Did you hear Mr. Nichols' testimony?

A. Yes, sir.

Q. Were you present at the time of the proceeding between Bowers and Nichols in regard to the machinery; what he testified to yesterday—I call your attention to Mr. Nichols' testimony, wherein he stated that Mr. Samuel McIntyre was there?

A. I was there at that time; it was an interview with Mr. Johnstone.

Q. Was Mr. Samuel McIntyre there?

A. No, sir.

Q. William McIntyre there?

A. No, sir.

Q. Neither one of them?

A. Party he referred to was Mr. Pussey.

Q. None of the McIntyres—but Mr. Pussey was there?

A. Yes, sir.

Q. Were you present on the occasion that Mr. Barr was present, when a paper was given him?

A. Mr. Bowers owed Mr. Barr for materials—for provisions furnished down there at Tintic. Hadn't money to pay with; Mr. Barr was trying to get some. The people he owed had closed down on him. When he left Mr. Bowers had give him this letter.

COUNSEL: Letter introduced here yesterday.

Q. Are you through with the interview?

A. No, sir.

Q. Proceed.

A. Gave him that letter with instructions.

BROWN: Who?

A. Mr. Bowers. At his solicitation, that it was to be shown to Cunningham or McIntyre; he could show it to his creditors and gain time, but wait for the arrival of Butler Johnstone from England.

Q. Is that the paper, which you refer to?

A. Yes, sir; that is the paper.

COUNSEL: Dated October 26th, 1882; signed, W. H. H. Bowers, manager.

Cross-examination.

By Mr. BROWN:

Q. That paper, you notice that paper, shown to you—that letter-head did you?

103 A. I didn't notice the letter-head; I noticed the body of the paper.

Q. Who got all these letter heads?

A. Bowers.

"Office of Mammoth Mining Company, Salt Lake City. Location of reduction works, Tintic mining district, Eureka."

Q. Mr. Corker have you ever testified on this matter before?

A. Yes, sir, about three times.

Q. Did you testify on the first case, Morris against The Mammoth Mining Company?

A. I think I did.

Q. Weren't you sworn in the first case of Morris against The Mammoth——

A. Yes, sir, I think I was.

Q. You were sworn on the second trial of the case?

A. I think, I was.

Q. You were sworn on the third trial and examined there at considerable length?

A. Sworn on the third trial and examined at considerable length.

Q. How about the first trial of the Morris case against the Mammoth Mining Company, did you tell about that interview with Morris? Did you tell them about it?

A. I don't think I did.

Q. You read over the fact discussed as to whether Morris had any knowledge and lack of knowledge on this trial didn't you?

A. Yes, sir.

Q. The second trial of the case did you testify to that interview?

A. I think I did. I am not positive.

Q. Isn't it true that you did not testify about that on the second trial?

A. I don't think so; I think I testified to it on the second trial.

Q. Isn't it true that the first time you ever mentioned having any interview with Mr. Morris was on the third trial? I ask you again if on the last trial was the first time you ever mentioned having seen Mr. Morris in regard to that contract?

104 A. I don't think, I did,—I think on the second trial. That is my impression.

Q. You say there had been an old bill between Bowers and Mr. Morris before that?

A. Yes, sir.

Q. Did you yourself take the order for that bill up there?

A. No, sir, I did not. I didn't take the order for that bill, but received a dun for it.

Q. Did you make out an order for it?

A. No, I don't think I did.

Q. Did Mr. Bowers make out his orders in writing?

A. Sometimes I made them out and sometimes by his direction.
Q. In writing?
A. Usually was.
Q. Did you see these first orders that went to Morris?
A. I think I did sir.
COURT: What capacity or relation did you occupy to this Mammoth Mining Company, in 1882–'3 when these contracts were in force?
A. I was in the relation of clerk.
Q. I will ask you if these orders were not in the name of the Mammoth Mining Company?
A. I think some—some were the other letter-heads.
Q. Were they headed—he signed himself as manager?
—. ——.
Q. Do you remember the date that these orders went to Morris?
A. I cannot give the dates in the orders—were present at the other trials in Salt Lake City.
COURT: In 1882–'3?
A. In 1883.
Q. How long after the delivery of these goods was it Morris was down there asking about the contract?
A. Before furnishing the goods. My impression is this: They furnished a small order that was given to Mr. Morris, or sent up to the office, for a few sacks of fire coal.
Q. That is what you talk of being dunned for?
A. Was dunned in 1881.
Q. When were these duns?
A. Got the duns in the fall of 1881.
105 Q. Fall of 1881?
A. Yes, and in the spring of 1882.
COURT: Well, was these duns for bills that Mr. Morris had furnished the Mammoth Mining Company?
A. No, sir, previous to that. Bowers was mechanical engineer doing work at Butte City, Montana, and other places.
Q. Morris didn't want to trust him, Bowers any longer?
A. No, sir, I don't blame him either.
Q. He went down to your office?
A. That there was such a showing that he was satisfied; that there was a contract. He made himself good with Mr. Morris, and trusted Bowers on his own responsibility.

By Mr. BROWN:

Q. On either of those trials, did you testify about this interview with Stringer?
A. I don't know; I think I did.
Q. Which one?
COURT: I don't regard that as material. Stringer testified to it.

By Mr. BROWN:

Q. Was there any meeting between 1882 and 1883?
A. Yes, sir; three meetings between 1882 and 1883.

Q. What did they all relate to?

A. Purchase of some property—162½ feet. "Marion"—"Edwards" (?) and "Bennett."

Q. What paid for this one, do you know? Didn't Bowers pay for them?

A. Yes, sir, I think he did.

Q. Title taken in the name of the company?

A. I cannot say.

Q. What was the next meeting about?

A. It was to purchase a claim—adjoining claim—called the Golden King (?).

Q. Bowers paid for it?

A. No, sir; I think the company paid for that.

Q. What was the third meeting about?

A. To give the right of way to the Salt Lake & Western Railway Company through the company's ground.

By Mr. BENNETT:

Q. Did you have any meeting of the board touching the working of the mines, building smelters and running furnaces,
106 from the time the possession was turned over to Bowers to June, 1883?

A. No, sir; no action of the board touching the mines until we assumed possession in June, 1883.

Q. Do you remember the date of those two orders you spoke of?

A. Which two?

Q. Orders on the Mammoth Mining Company from Bowers to Morris. Was it in 1882?

A. Yes, sir; early in 1882.

—. ——?

A. Not the first order.

SAMUEL MCINTYRE sworn for defendants:

By Mr. BENNETT:

Q. You are a stockholder in the Mammoth Mining Company, are you?

A. Yes, sir.

Q. During the term of the contract with Mr. Bowers, and the subsequent contract of November 1st?

A. Yes, sir.

Q. You are the Samuel McIntyre named in this contract?

A. Yes, sir.

Q. Where do you reside?

A. Tintic.

Q. When those smelters were being erected that have been spoken of?

A. Yes, sir.

Q. Do you know Mr. Elias Morris?

A. Yes, sir.

Q. Do you know of his doing certain work there in the construction of smelters and refinery?
A. Yes, sir.
Q. State whether you ever saw Mr. Morris there.
A. Yes, sir.
Q. Any conversation with him in regard to these contracts?
A. Yes, sir, in regard to the payment of the contract.
Q. State what conversation you had with him.
A. About the 1st of January; one April 1st and the 10th.
Q. What year?
A. 1883.
107 Q. State what conversation you had, and all about it.
A. I think at one time—one evening Mr. Morris came to my house; and something came up in regard to the risk of the parties; he asked if they were making the payments to us—keeping their contract good or not.
COURT: He asked you that?
A. Yes, sir.
Q. What further was said in the conversation; state all that conversation.
A. I think that was the substance of the conversation.
Q. Asked you how you were getting along and whether they kept the contract good?
A. Yes, sir.
Q. What did you tell him?
A. Told him they had paid to that time.
Q. Did you have any further conversation in regard to the same subject at any time or place; if so, when and where?
A. I think once more there at Tintic; not at the house. That was some time in February.
Q. Where was that?
A. I think in the new smelters; near the new smelters.
Q. Repeat as well as you can what passed between you.
A. I think something passed first—how we were getting along, and whether the money had come from England—Mr. Johnstone was expecting some money about the 10th of February.
Q. What did you tell him?
A. I told him I understood the money didn't come yet at that time.
Q. Is that all?
A. I think that is pretty much all.
Q. Are you able to fix that date with any certainty?
A. No, sir, I cannot fix the date.
Q. Were you in negotiations for the sale of your house?
A. Yes, sir.
Q. To whom?
A. To Mr. Johnstone.
Q. Of your house there?
A. Yes, sir.
Q. Don't you know when that was?

108 A. He was to pay me on the 10th of February on that house.

Q. He was to pay you on the 10th of February?

A. Yes, sir.

Q. With reference to that time when was it?

A. Some time prior—some time—about that time.

Q. Did you have any further conversation with Mr. Morris in regard to the contracts or payments?

A. The next one was in regard to the payments. The next one was in Salt Lake, at that time.

Q. When?

A. Last day of January or 1st day of February.

Q. Where was it and what was said?

A. On Main street, near Mr. Bowers' office—in the entrance to Bowers' office. I came up from Tintic the day before and met Mr. Morris there in front of Mr. Bowers' office. He asked how they were getting along there.

Q. By "them" who did "them" refer to?

A. Bowers and Johnstone. Told him they were getting along slowly, as fast as they could go; set a contract—they were doing nothing much—reduced their shift a force.

Q. They run a tunnel the 1st of February?

A. Yes, sir.

Q. During the time these smelters were in course of construction were you at Tintic and the most of the time?

A. Yes, sir.

COURT: Do you attribute the loss or violation of the Bowers and Johnstone contract, to the incapacity of the mine to produce a profit?

A. For the want of management.

Q. The mine has been paying dividends since you obtained possession of it in June?

A. Yes, sir.

Q. That is the mine; the works have not been used?

A. We have shipped the ore since that time to Denver..

Q. Did you hear Mr. Stringer testify?

A. Yes, sir.

Q. I speak of a notice?

A. I did not see that notice.

109 Q. Did you ever see a notice on the staff officers?

A. No, sir.

Q. Never at the works?

A. No, sir.

Q. There was a set of bills introduced headed "smelting works," did you ever see them?

A. I don't remember that I ever did.

Q. Mr. Stringer spoke of a meeting of the staff held at that house, I want to ask if Johnstone occupied any portion of your house.

A. Yes, sir, Johnstone rented a portion of my house. No, sir, I agreed to sell it to him. I didn't give him possession entirely.

Q. Did you attend that meeting of the board?

A. I was in the dining-room; they held a standing meeting that afternoon. I took no part in that at all.

COURT: I don't remember who was standing so.

Q. Do you remember some of them?
A. Mr. Stringer, Mr. Johnstone, Cohn, and several others were there. Some came in and reported to Mr. Johnstone and went out, and others came in.
Q. Who was the staff?
A. Men in charge of the *the* different gangs and departments of the work.
Q. That the only meeting you were at?
A. That is the only meeting I know anything of.
Q. That staff erected by Johnstone?
A. I presume so. I took no part in that.
Q. You were interested—an interested party, to see that the contract was carried out?
A. Yes, sir.
Q. In regard to those furnaces?
A. Yes, sir.
Q. Do you know about the payments that were made on the contract?
A. I know there was payments made, received from Bowers after that.
Q. Know that stock was issued as in the contract?
A. Yes, sir.

Cross-examination.

By Mr. BROWN:

110 Q. Did you know Cunningham had charge of the work of construction during the month of November, 1882?
A. Yes, sir.
Q. He was then in charge when you went out to locate the refinery?
A. No, sir, think not.
Q. You heard Mr. Stringer's testimony on that subject?
A. Yes, sir.
Q. You didn't see the notice of the rules posted around there?
A. No, sir.
Q. You say you didn't see the notice in regard to the local men?
A. No, sir.
Q. Did you sign any of the pay-rolls yourself?
A. Yes, sir.
Q. Did you look at the reports of the value of the matte? Did you go to look at the reports of the value of the matte at the assayer's office?
A. No, sir, never did.
Q. In that year?
A. Not to my memory.

Q. You have looked at the assayer's report?
A. No, sir.
Q. Never?
A. No, sir.
Q. How many times during the month of January did you have a talk with Mr. Morris?
A. I think twice.
Q. Three times you had a talk with him on the subject?
A. I haven't said three times. I might have talked as many as three times.
Q. You didn't swear positively that you talked with him three times?
A. No, sir.
Q. When was the first?
A. In my house.
Q. What time?
A. January, about the 1st. From the 1st to the 10th.
Q. Who was present?
111 A. I don't think anybody was present at the time. Mr. Johnstone was behind. Mr. Morris inquired of me, and I said he was paying us.
Q. Where was the second?
A. Near the furnaces.
Q. Where was the third?
A. In Salt Lake City. One in front of Bowers' office. I don't think anybody was right present; I think my brother was not far away, and I think Mr. Cunningham.
Q. Who was present at the talk near the refinery?
A. I didn't say refinery; I said near the smelters. I think nobody, right there. Workmen there.
Q. He wanted to know how they were getting along?
A. Yes, sir.
COURT: Mr. McIntyre, some witness, I think Stringer, testified that some time in June—June, 1883, you came down to the works and men, and brought with you a contract, and read to the men, which contract you understood showed that the mine—or rather the mining company—wasn't responsible for any debts contracted for their wages.
A. What contract?
Q. Of November 1st, I think.
COURT: Why was it that you went there to read it at that time?
A. We took charge of the property at that time. The men were all looking anxiously and waiting for something from Salt Lake. They all came to me to know what the facts was, whether any arrangement had been made or not for the continuance of the works. There again they asked, and I drew that again at the request of some of them, I read the contract, after they insisted that the mining company was liable for their wages.
Q. Did you understand that you were not liable?
A. I didn't consider we were; didn't have anything to do with the works, or debts, and didn't think the company liable.

Q. Did they seem to think or claim that the company was liable to them?

A. No, sir, I think not.

Q. You read the contract to them to show that the company was not?

112 A. I claimed that under a proper construction of it, the company was not liable.

By Mr. BROWN:

Q. You swear that they didn't understand that you was liable?

A. I don't think it.

Q. Didn't they refuse to turn you possession?

A. No, sir.

Q. Didn't they put liens on this property afterwards?

A. Not that I understand——.

Q. Not by the workmen?

A. No, sir.

Q. Didn't these workmen bring suit, didn't some broker sue you on some checks? Didn't they hold a public meeting and appoint a committee?

A. I don't know whether they did or not; I wasn't at the meeting if they had such a one.

Q. Didn't that committee wait before you and compromise?

A. They did not.

Q. Man by the name of Daywenty (?) and Durfey? (?)

A. A man by that name lived at Salt Lake; not one of the workmen.

Mr. CORKER recalled:

(Reading of resolution.)

"JUNE 8TH, 1883.

"Meeting of the board of directors."

(Dated June 8th, 1883.)

WILLIAM MCINTYRE sworn for defendants:

Q. You are a stockholder in the defendant company?

A. Yes, sir.

Q. One of the parties to the contract with Bowers—same William McIntyre named in that contract?

A. Yes, sir.

Q. Do you know Mr. Morris?

A. Yes, sir.

Q. Ask you if at any time you had a conversation with him, or him with you, about the contract with Mr. Bowers of November, 1st and 22d, or either of them?

A. Yes, sir.

Q. State when was the first time he had any conversation with you in regard to them.

113 A. Was going from Tintic to Salt Lake; on the train Mr. Morris asked me if Butler Johnstone was interested in the contract with Bowers.

Q. What did you answer?

A. I told him he was. In that conversation he wanted to know in relation to the refinery works; whether we would give time on the refinery.

Q. Was that about the last of February?

A. 1883.

Q. That is the first conversation you ever had with him?

A. Yes, sir.

Q. That payment was then paid?

A. It was coming due on the 1st of March.

Q. I call your attention to a conversation in regard to that back payment?

A. In Morris' pig pen?

Q. Before the one you spoke of.

A. I think, after I came back.

Q. State what conversation you had.

A. He had a hog pen up one side—got a number of hogs, and he asked me to step out and look at them. He asked if they had made their payments so far.

Q. What payments?

A. The payments that the contract called for.

COURT: State exactly what he said and what you said.

A. Mr. Morris asked me right there if Johnstone and Bowers had made any of their payments upon that contract. That was about the 1st of March, 1883. I told him they had.

Cross-examination:

Q. Did he pay in March?

A. I think a little advanced in March.

Q. Do you remember the exact date?

A. I don't remember; about the 22nd of February.

Q. Before Johnstone went away?

A. Johnstone went away in March.

Q. Was it before he went away when that payment was made?

A. Yes, sir.

COURT: Where is Johnstone?

A. Well, I don't know.

Q. Have you any idea?

114 A. No, sir.

Q. Did he go back to England?

A. Went back that way somewhere.

Q. Where is Bowers?

A. Was in Salt Lake couple of months ago.

JOHN B. HARTFORD sworn for defendants:

By Mr. BENNETT:

Q. You are a short-hand reporter, are you?

A. Yes, sir.

Q. What do you hold in your hand?

A. These are the notes of Adam S. Patterson taken in the third district court, filed April 5, 1886.

Q. Do you know whether that is the second trial of the Morris case?

A. Yes, sir, it is.

Q. I will ask you to state to the court if the defendant in that case, put in any testimony?

A. No, sir, I don't see any here.

Q. What is the last thing down there? There was no testimony taken on the part of the defendant?

A. No, sir, I don't see any.

By Mr. BROWN:

Q. All you know about it is you don't find it in that book. You didn't attend the trial?

A. No, sir, I did not, I see that this book is complete.

Mr. CUNNINGHAM recalled.

By Mr. BENNETT:

Q. Were you ever present at any meeting of the staff?

A. No, sir.

Q. Was not around at the erection of the refinery?

A. No, sir.

Deposition of A. Monroe Butler Johnstone offered in evidence.

(Deposition read.)

Objection as to the 19th interrogatory. Overruled. Exception.

Same objection to the 20th interrogatory. Calling for a conclusion.

Objection overruled. Exception.

24th interrogatory:

BROWN: I object to the fore part of that—calling for his conclusion.

115 6th interrogatory:

Objected to. Overruled. Exception.

27th interrogatory, objected to, as calling for his conclusion.

Deposition of Edward Austin read.

Defendants rest.

Mr. CULMER called for plaintiff:

By Mr. BROWN: Mr. Culmer, what is your connection, if any, with the plaintiff?

A. Now?

Q. Yes, sir.

A. I am a director.

Q. What was it in the summer of 1882 and winter of 1883?

A. Was a director.

Q. Who else was directors?

A. Mr. William White (?) Phillip Pugsley, Mr. Elias Morris, Mr. Pierpont and Mr. Hurand (?)

Q. Did you have any knowledge at any time that the goods were being delivered, or any knowledge of the notices which have been testified to by witnesses?

A. No, sir.

Q. Did you know of the existence of this running account with the Mammoth Company?

A. Yes, sir.

Q. Did you have any reason to believe that the goods were being delivered to any other person?

A. No, sir.

Q. You are a merchant in Salt Lake, are you?

A. Yes, sir.

Q. Mr. Culmer, did you hold any office at all?

A. Secretary and treasurer.

Q. Was there an office of this company, or manager, whose duty it was to manage and look after and direct the affairs of the company, above any other officer; if so, whom?

A. No, sir, the management of the company was done by the board of directors, by appointing a superintendent from time to time; this superintendent was under their direction.

Q. I asked you if there was any officer of the company—officer, who was to look after and direct the business of the company.

116 A. The superintendent, Mr. Pierpont.

Q. He was superintendent with the usual orders?

A. Yes, sir.

Q. What other men did you have?

A. Book-keeper and foreman.

Q. Ask you who had authority to make contracts?

A. The superintendent.

Q. Did those other gentlemen have authority to take small orders?

A. I don't know that they were ever allowed to make contracts; had authority to take small orders, but not contracts.

Q. Take small orders and fill them?

A. Yes, sir.

PHILLIP PUGSLEY sworn for plaintiff:

Q. Were you one of the board of directors in 1883?

A. Yes, sir.

Q. You are in business in Salt Lake City?

A. Yes, sir.

Q. Did you know of the existence of this account against the Mammoth Mining Company?

A. I heard of it.

Q. Did you know anything of these contracts in existence between Bowers and others?

A. No, sir.

Q. Never heard of it?
A. No, sir.
Q. Did you have any reason to believe that any other person but the Mammoth Mining Company used any of the goods that were got?
A. No, sir.
Q. Did you know Mr. Pierpont?
A. Yes, sir.

Mr. WHITE sworn for plaintiff:

Q. Mr. White, was you one of the board of directors of plaintiff in the year- 1882-'3?
A. Yes, sir.
Q. Did you know of this account being run at that time?
A. Yes, sir.
Q. Did you have any reason to believe any other than the Mammoth Mining Company was the party to whom the credit was given?
117 A. No, sir.

Mr. PUGSLEY, JR., sworn for plaintiff:

Q. Mr. Pugsley, you were the book-keeper of the plaintiff—I believe, you testified before?
A. Yes, sir.
Q. Did Butler Johnstone have a separate account at one time?
A. Yes, sir.
Q. What name?
A. In the name of Butler Johnstone, superintendent.
Q. Distinct from this Mammoth account?
A. Yes, sir.
Q. Did you at the time of this account, make those entries, have any knowledge of any contracts put in evidence here, between Bowers and Cunningham and McIntyre?
A. No, sir; never heard of them.
Q. Did you have any reason——

(The question was objected to; overruled, and exception taken.)

ELIAS MORRIS recalled:

Q. Mr. Morris, what was the first, if ever you heard of any contract between Bowers, Cunningham and McIntyres, and how much did you hear about it?
A. Well, I never heard of anything in regard to the contract that has been read here until after the thing busted up.
Q. As to the fact that there was no contract?
A. Nothing except the sale of stock.

COURT: They were disposing of stock of the company.

Q. Was there a time when any of the gentlemen showed you a part of the contract?
A. No, sir, never.

Q. I mean during the period prior to the 8th of June?
A. No, sir.
Q. You heard Mr. Crocker's testimony?
A. Yes, sir; I did.
Q. Do you remember an occasion that Mr. Bowers sent some orders up?
A. Yes, sir; I do.
Q. What was the form—in his name?
A. Mammoth Mining Company, W. H. H. Bowers, manager.
118 Q. Did you have any occasion to examine into the contract?
A. No, sir.
Q. Did you go down to Bowers' office to examine, and did you show him that contract?
A. No, sir.
Q. In 1882—early in 1882?
A. No.
Q. Do you remember the date of these contracts—of these orders, I mean?
A. Well, I think some in February, 1882—I never had occasion to question the orders upon the Mammoth Mining Company.
Q. When Mr. Cunningham and Austin came to you in the fall of 1882, did they say anything to you abour the contracts between Bowers, McIntyre and Cunningham?
A. No, sir.
Q. At any time did Cunningham mention to you about the contract?
A. Not before the thing collapsed.
Q. Did you go over to Mr. Sam. McIntyre's house, and there tell you that the payments were being kept up on the contracts?
A. I have no recollection of that contract at all.
Q. Did you again at the smelting works ask him if the contracts were being kept good?
A. No, sir; I have no recollection of such talks.
Q. Did you have such talks with him as he testified to?
A. No, sir.
Q. Were you standing near the office of the company—have any talk about the contracts or payments upon them?
A. No, sir; never.
Q. Did he tell you on the street in Salt Lake that they were going to hell down there?
A. I believe he did mention something about they were working in the cold weather, not fit to work. I asked how they were progressing—the men that were engaged there were not earning their wages; were all the time around the fire.
Q. Was there a talk when Austin showed you some paper at the bank, when Cunningham came in?
A. Some time in February, when I went in to make some
119 inquiry, I saw Mr. Austin; he had informed me at different times that money was coming from the sale of this stock, and

he brought a large, long envelope out, about that size, from the attorneys on the other side, and Lord Fitzgerald—to make inquiry in regard to some stock purchased, as they had not received the stock.

Q. About when was that?

A. Somewheres in February—beginning of February, I think—cannot state the date. At the same time he told me about this trouble.

Q. What trouble?

A. About some money needed to make something—the letter was signed by some lawyer, I don't remember his name. That is all the papers or documents he ever showed me in any way, shape or form.

Q. Did you ask Bill McIntyre on the train, along near the 1st of March or February, 1883, if Bowers had any assistance, and who they were?

A. No, sir.

Q. Or who Butler Johnstone was?

A. I couldn't talk about the transaction, because I didn't know nothing of the contract.

Q. Did you ask him if Butler Johnstone was interested in the contract?

A. I don't remember. I know that he was connected with him in the stock, but didn't know anything about the contract.

Q. Didn't ask about any extension of the time, for the building of the refinery?

A. I have no recollection of that.

Q. This letter of Butler Johnstone of the 11th of December, which was introduced in evidence last year, when did you first see that letter?

A. I have no recollection of that letter.

Q. Do you remember its being read over last year by Mr. Cunningham?

A. No, sir, I don't remember.

(Marked Exhibit "55.")

(Letter read.)

Q. Did he ever read that to you, or the book-keeper?

A. He had transferred everything, a week before that,
120 in my own office. He had told me he turned over everything to Johnstone, including that——

Q. What date was it that he transferred the mine?

A. 4th or 5th—December, 1882.

Cross-examination.

By Mr. BENNETT:

Q. I call your attention to two receipted bills, one dated July 5th, 1882, both dated the same date, and check attached, dated September 14th, 1882, signed by W. H. H. Bowers, paid to Elias Morris. Bills, receipts, by Elias Morris. Were those bills received by you?

A. That is my signature.

(Bills introduced.)

COURT: These are bills made out by you, Mr. Morris, in this form?

A. Yes, sir.

Q. And check paying them?

A. Yes, sir.

(Marked Exhibit "58.")

Q. I show you two checks—signed, H. A. Monroe Butler Johnstone; one dated the 6th day of February, 1883—3rd day of February, 1883, one 31st day of January, 1883—13th day of January, 1883. Did you receive them as payment of goods furnished by you to Butler Johnstone?

A. Can take the checks in any name if they are cashed.

Q. Now introduce a package—33 shipping and expense bills attached—I will ask you if these are shipping bills by you to Butler Johnstone. This is your letter-head?

A. Yes, sir.

Q. You gave directions who to ship to, didn't you?

A. My clerk generally attended to that.

Q. Your book-keeper?

A. Yes, sir.

(Shipping bills marked Exhibit "59.")

Objected to by Brown as being hearsay.

By Mr. BROWN:

Q. Whose handwriting is the body of one that has been introduced—Exhibit "51?"

A. That is my signature.

Q. In whose handwriting?

A. I don't know.

121 Q. Is it your book-keeper's?

A. I don't know.

Q. Made out in your office?

A. I don't know.

Q. I will ask you if these were made out in Mr. Bowers' office and signed by you.

A. Made out by his clerk.

Q. I will ask you what part you took in the management of the plaintiff company in this case.

A. I was superintendent of the company.

Q. Did you have anything to do with the business part, any more than any other director?

A. Yes, sir.

Recess till 1.30 p. m.

1.30 P. M.

Examination of Mr. MORRIS continued.

By Mr. BROWN:

Q. Just as we adjourned, I showed you a bill made out on a blank. I want to know as to the cou-se of business; how that was done.

A. My clerk forwarded the bill to the Mammoth Mining Company from our office.

Q. You sent up one bill, and they returned this copied by their clerk on their own heading——

A. Yes, sir.

COURT: Preferring to use their own blanks?

A. Yes, sir.

Plaintiffs rest.

SAMUEL MCINTYRE recalled.

COURT:

Q. Did I ask you how long this mining business had been going on before this contract of January, 1882?

A. I answered some 6 or 7 years probably.

Q. What did you answer to that question?

A. Probably 8 years.

Q. At the time that contract was made in January, 1882, was the mine then in operation?

A. Had been up to December 1st.

Q. Was it at that time?

A. Probably was closed down for that purpose.

Q. It was in operation up to the time it was turned over to these people?

122 A. Yes, sir.

By Mr. BROWN:

Q. Did operation continue under Bowers?

A. Yes, sir.

By Mr. BENNETT:

Q. How long had it been running under this company?

COURT: He said about a year.

By Mr. BROWN:

Q. Of the usual form—the incorporation papers?

A. I think so.

Testimony closed.

(Title of Court and Cause.)

EDWARD AUSTIN, being duly sworn, testified as follows:

Direct examination by Mr. BENNETT:

Q. Mr. Austin, what is your full name, age and place of residence?

A. Edward Austin; 40; Kansas City, Missouri.

Q. Where did you reside in 1882 and '3, Mr. Austin, and what was then your business?

A. I was manager at that time of the London Bank of Utah, Salt Lake City.

Q. And you resided in Salt Lake City?

A. I resided in Salt Lake City.

Q. Did you then know the organization called the Mammoth Mining Company?

A. I did.

Q. Did you then know W. H. H. Bowers and H. A. Monroe Butler Johnstone?

A. I did.

Q. State whether or not you knew at the same time, or during those years, the Salt Lake Foundry & Machine Company.

A. I knew the Salt Lake Foundry & Machine Company at that time.

Q. Who, so far as you know, were officers and managers of that company during those years?

A. Well, I know that Mr. Pierpont was an officer, and my recollection is that Mr. Morris was president.

Q. State whether that company had business with the bank of which you were then manager. I confine your attention
123 now to the fall of 1882, and winter and spring of 1883.

A. Well, I hardly know; the company kept an account with the bank at one time, but I think it was closed at that time.

Q. Did you have any business during the autumn of 1882 and the winter of 1883 with Elias Morris, whom you have named as president of the Salt Lake Foundry and Machine Company?

A. Yes, I did, personally.

Q. About when did your business with him commence?

A. Well, some time in October—November, it might even be the beginning of December 1882, I had some business with him.

Q. You may state now whether that business related at all to the affairs of the Mammoth Mining Company at Tintic, in this Territory.

A. It related to the construction of furnaces down at the Mammoth perhaps.

Q. You may state generally what constructions, and what your business was in that regard with Mr. Morris.

A. Well, there had been certain amounts remitted from London for the construction of furnaces, and I was asked to see to the expenditure of this money; I told them that I couldn't do that unless Mr. Cunningham, who was connected with the company would attend to it for me, and as I had every confidence in Mr. Cunning-

ham, if he agreed to do so I would take charge of the expenditure of the money.

Q. State right there from whom the money came, if you know.

A. The money came, so far as I know, from a Mr. Walker—J. M. Walker, that was the name; J. Montgomery Walker was the name of the gentleman whom I drew the drafts on for the money.

Q. Money transmitted from London to the London Bank of Utah for expenditure in these works that you speak of?

A. Yes, sir.

Q. Now, you may state as briefly as you can, the connection of Mr. Morris with the work which you was authorized to do with this money. I speak now of the initial transactions between you and Mr. Morris.

A. Well, either Mr. Cunningham or I asked Mr. Morris to
124 make a bid on this work; we got several bids; Mr. Morris' bid was a little higher than we had from some others, I forget whom; but as Mr. Morris was a well-known man, and a responsible man, I suggested that if he would make a little reduction that we would prefer giving the contract to him.

Mr. BROWN: I don't know how far this may go. Do you expect me to object on the trial, or here?

Mr. BENNETT: Yes, that may be reserved, if you please, and the reporter may note it.

Mr. BROWN: This may be hearsay; I don't know whether it is or not.

Mr. BENNETT: Save any objection you please to the materiality of the testimony.

Mr. BROWN: Well, I object to it as being hearsay, anyway, and immaterial—all this that transpires with Morris.

(Question read and answer.)

WITNESS: He did so, and got the contract.

Q. What, if any, communication did you make to Mr. Morris at that time in regard to the sources from which the money was derived?

A. I told him that this money was coming from London, and that we expected in the event of the money giving out at any time that we wouldn't be responsible for anything, and we expected him to shut down at once, not take any responsibility on himself.

Q. By "we" whom do you mean?

A. Mr. Cunningham.

Q. And in what character did you and your associates act?

A. Mr. Cunningham and I, we acted as trustees for this Mr. Montgomery Walker.

Q. In pursuance of this original negotiation with Mr. Morris, was a contract made with him regarding the works to be erected at Tintic?

A. The contract was made; I don't know that there was a written contract, but there was a verbal agreement made under which Mr. Morris proceeded to do the work.

Q. What, if any, information other than you have stated did you communicate to Mr. Morris in regard to the party or parties doing the work and responsible for the work at that time or subsequently?

125 A. Well, some time later, when Mr. Butler Johnstone came here, I had occasion to see Mr. Morris, and at that time he asked me a good deal about this Butler Johnstone; I told him that I had learned from London about him; I told him he was a man of good family, very well connected, and was left a great deal of money by his father, and I think, had been an English member of Parliament, I told him for Canterbury, for some years.

Q. About when was that, with reference to the original transaction?

A. It was some time after the original transaction.

Q. Referring now to the original transaction, did Mr. Morris go on with the work at the smelters?

A. He did.

Q. And for how long a time, under the trusteeship of yourself and Mr. Cunningham, if you remember?

A. Well, I couldn't say for a certainty, but I should say somewhere about five weeks—roughly; anyhow, it was after the arrival of Butler Johnstone from England.

Q. Now, state who was Butler Johnstone, and what was his connection with the work which you and Mr. Cunningham authorized at the mines in Tintic.

A. Well, Butler Johnstone had a half interest in the contract that Bowers had from the two McIntyres and Cunningham, who had the control of the stock of the Mammoth Mining Company.

Mr. BROWN: Save an objection to me to this, that there is better evidence of it, and that it is immaterial anyway what the real relation was.

Mr. BENNETT: Used at this point simply to identify the name of the person.

Q. At the time you and Mr. Cunningham as trustees entered into this arrangement with Mr. Morris for the erection of works, had you knowledge of any contract existing between the Mammoth Mining Company and W. H. H. Bowers or Mr. Butler Johnstone in regard to the erection of those works?

Mr. BROWN: I object to it as immaterial.

A. Well, I had no knowledge of any contract between the company and Bowers.

Q. Had you any knowledge of any contract touching the stock of that company?

126 A. I had.

Q. Between the company and Bowers; and had you that knowledge at the time the contract was made with Morris for the erection of the works you speak of?

A. Yes, I had.

Q. Now, as to what works did that contract with Mr. Morris relate?

A. It related to the construction of six additional furnaces.

Q. Furnaces for what purposes, and where to be erected?

A. To be erected on the property of the Mammoth Mining Company at Tintic.

Q. For the purpose of reducing——

A. (Interrupting.) For the purpose of reducing the ore of the Mammoth mine.

Q. When, if you know, did Mr. H. A. Monroe Butler Johnstone reach Utah in connection with that contract, or for the purpose of carrying out that contract, or in reference to the business of the Mammoth Mining Company?

A. Well, my recollection of his arrival is that it was some time in the beginning of December.

Q. State whether or not that was after the arrangement which had been made with Mr. Morris for the erection of the smelters.

A. It was; it was some time afterwards.

Q. Up to the time Mr. Butler Johnstone reached Utah, how had the business been conducted on the part of the proprietors of the works, by yourself and Mr. Cunningham?

A. The work had been conducted in the name of Cunningham and Austin, trustees; it might be James A. Cunningham and Edward Austin, trustees.

Q. After Mr. Butler Johnstone came here was there any change in the manner of conducting that business?

A. There was.

Q. State what that change was.

A. Well, I called Mr. Cunningham's attention to the fact that Butler Johnstone was here, and he would attend to those matters himself; I offered now—up to them, I considered that we were released entirely from our agreement with Mr. Morris.

Q. What parties, company or association did Mr. Johnstone, so far as you know, represent from the time he came here?

127 A. So far as I know he represented himself and James Montgomery Walker.

Q. Do you remember, and can you state, and if so do so, when Butler Johnstone arrived in Utah in connection with this business?

A. Well, my recollection is that it was some time in the beginning of December.

Q. Of what year?

A. 1882.

Q. (Showing paper to witness.) I will ask you to look at a letter which I now show you, and state upon what occasion that was written; and hand it to the stenographer to be identified; state by whom it is signed, with its date.

A. Well, that letter was written at my request. I requested Mr. Cunningham to get it from Mr. Butler Johnstone to show to those tradesmen that he had had dealing with under this trustee business, so that we might be entirely exonerated from any responsibility for any indebtedness that might exist at that time.

Q. By whom, now, it is signed?
A. It is signed by H. A. Munroe Butler Johnstone.
Q. And that is his signature?
A. That is his signature.
Q. What date is it?
A. It is dated the 11th of December, 1882.

Mr. BENNETT: I ask that that be attached to the deposition.

(The same was marked "Exhibit A, F. E. McGurrin, stenographer," and is hereto attached.)

Q. Mr. Austin, if after the event of H. A. Munroe Butler Johnstone in connection with this business, Mr. Morris to your knowledge was advised of it, state when as near as you can, and the circumstance or circumstances connected with the first knowledge conveyed to Mr. Morris.

A. Well, the first knowledge conveyed to Mr. Morris by me of Butler Johnstone's connection with this business, was a very short time after Butler Johnstone's arrival here; he left a note for $5,000 at the London Bank of Utah, which he said Mr. Morris would pay—would take up.

Mr. BROWN: I object to that as hearsay.

A. (Continuing.) I took the note up to Mr. Morris' office
128 for collection, as it were; Mr. Morris gave me a check on the Deseret bank for it.

Q. Now, about when was that, Mr. Austin, if you can state?

A. Well, it must have been, I should think, about the middle of December; I am not perfectly sure of that; it might even be a little later.

Q. At whose request did you take that note to Mr. Morris?

A. Well, at no one's request, but the note was left there by Butler Johnstone; I took it up myself, of my own accord.

Q. At the time you took the note which you have spoken of to Mr. Morris, had you knowledge, as manager of the London Bank of Utah, of the contract between the Mammoth Mining Company and Mr. Bowers?

A. I had no knowledge of any contract between the Mammoth Mining Company and Bowers.

Q. Or the stockholders of the Mammoth Mining Company?

A. I had knowledge of a contract between the stockholders and Bowers.

Q. State whether or not, at the time you took that note, Mr. Morris, to your knowledge, knew of the existence of the contract between the stockholders of the Mammoth Mining Company and Mr. Bowers, or a contract between the stockholders and Mr. Johnstone or Mr. Johnstone's clients.

Mr. BROWN: I object to that as hearsay, immaterial, and calling for a conclusion.

A. Well, I am not perfectly positive of that, but my impression is that I spoke to him about it; he ask me quite a number of ques-

tions in regard to the connection of Butler Johnstone, and of course I—I am not perfectly sure as to what I said about the contract.

Q. I show you now a pass book, seeming to be a bank pass book, marked "The London Bank of Utah, Limited, in account with H. A. M. Butler Johnstone. Mining account," and refer you to the first page; ask you whether that shows the transaction of the note you have just spoken of, and if so be good enough to state to the reporter what it shows in that regard, and hand to him the book to be attached to this your deposition.

129 A. I recognize the book as being the handwriting of the book-keeper of the London Bank of Utah; I recognize this entry as being the credit entry for the amount of the $5,000 received from Mr. Morris for the note.

Q. Please give the date of it.

A. It is dated—the credit is made December the 23d, 1882.

(Said book was thereupon marked "Exhibit B, F. E. McGurrin, stenographer," and is returned herewith.)

Q. I will ask you now to state, Mr. Austin, whether at the time you presented that note and procured the money which makes the credit in that bank book, you had any conversation with Mr. Morris in regard to H. A. Monroe Butler Johnstone's connection with the Mammoth property, and if so, what that conversation was at that time, as near as you can now remember.

Mr. BROWN: I object to that as hearsay and immaterial.

A. Well, I remember that I told him that he had an interest with Bowers in the working of the property.

Q. Proceed.

A. Well, I don't remember very much else that I told him about that part of it; he was more interested as to what Butler Johnstone was personally than anything else.

Q. State, Mr. Austin, whether at that time or subsequently you stated to Mr. Morris any particulars or facts connected with, or indicating the connection of Butler Johnstone with the Mammoth operation or business.

A. Well, later, about the time the payment due by Bowers and Butler Johnstone, which was the 5th of March, I think—Mr. Morris came to the bank and made inquiries as to the matter.

Q. Well, in that connection, what, if anything, did you communicate to him in regard to the payments?

A. Well, I communicated to him the knowledge as to when the payments were due.

Q. Did you communicate to him in that regard the terms of any contract existing between Bowers and the stockholders?

A. I did.

Q. Or between Johnstone and the stockholders?

A. I did, as to the payments due on the contract.

130 Q. (Showing paper to witness.) I ask you now to look at a contract which I present to you, dated the 1st day of Novem-

ber, 1882, and ask you to state, what, if any portions of that contract you brought to Mr. Morris' attention at any time; and if any, when.

Mr. BROWN: I object to this as calling for the conclusion of the witness, and not the statement of conversation, as well as hearsay, and immaterial.

A. I called his attention to the time when the first payment would be due under this contract; when I say the first, it really was the second, as there was one paid on the completion of this contract, it is the next one I mean.

Q. Which would be at what date?

A. Which would be 125 days from the 1st of November.

Q. About what time, and, if you can state, state upon what occasion you called Mr. Morris' attention to that provision of the contract.

A. Well, at the time when he was making inquiries as to how they were progressing with the payment, as to whether it would be made or not.

Q. Well, state whether that was before or after the transaction of the note.

A. Oh, that was long after that.

Q. Let me ask you now, was the contract to which your attention has now been called, deposited in the London Bank of Utah, at the time?

A. It was.

Q. State whether or not Mr. Morris, upon more than one occasion, asked you with regard to the performance of that contract touching the payments.

A. He did, several times.

Q. As near as you can, state when; I don't ask you for the day, but the occasions if you can remember.

A. The occasions were a few days before the maturity of the payments.

Q. State whether you ever communicated to Mr. Morris on any of those occasions the fact that such a contract existed. I do not now call your attention to the payments, but to the matter of the contracting parties; and did you communicate to him, or did you not, the fact that a contract existed between the stockholders of the Mammoth Mining Company and Bowers or Mr. Johnstone?

131 A. Well, I couldn't recall definitely any time that I went into particulars as to the contract; that is of course simply apart from the payments.

Q. Did you exhibit the contract which has been shown to you, and dated the first of November, 1882, to Mr. Morris on any occasion in the bank?

A. I did; not as a whole, but simply as to when payments were due.

Q. And that is the contract which I have just now shown you, is it?

A. That was the contract.

(The contract was thereupon marked "Exhibit C, F. E. McGurrin, stenographer.")

Q. The paper which you now present to the reporter, marked Exhibit "C," is the contract you refer to?

A. It is.

Q. Did you exhibit any portion of that contract to Mr. Morris personally—the text of the contract?

A. Well, that one part as to the payments I did.

Q. I would thank you to state, as near as you can, about when you did that first.

A. Well, my recollection is, it was just a little while before the maturity of the—well, you might call it the second payment on the contract.

Q. That would be at what date?

A. That would be—well it was due—there was some dispute as to a few days, anyhow, it was the beginning of March.

Q. Beginning of March, 1883?

A. 1883, I have referred to it as the 5th of March on one or two occasions.

Q. State whether or not the Salt Lake Foundry & Machine Company had any transactions through your bank with reference to the work being done under the contract which you have just now exhibited.

A. I don't understand that question, Judge.

(Question read.)

A. Only to get a check paid.

Q. I now hand you a check dated 6th of February, 1883, and ask you to state to the reporter whether that was presented at your bank.

132 A. It was paid through the Deseret bank, (said check was marked "Exhibit D, F. E. McGurrin, stenographer," and is returned herewith.)

Q. And paid by the London Bank of Utah?

A. Paid by the London Bank of Utah, to the Deseret National.

Q. Please state whether, at or about the time that check was paid or at any other time, any officer or agent of the foundry and machine company had, through you or to your knowledge, any notice or knowledge of the contract which has been exhibited here and marked Exhibit C, being the contract between Bowers and the stockholders of the Mammoth Mining Company.

A. Yes, I had some conversation with Mr. Pierpont, but I don't know that I said anything about the contract further than to tell him that Butler Johnstone and Bowers were the responsible parties for the work done there.

Q. And about when was that, as you remember now?

A. Well, my recollection is that it was some time in the beginning of January.

Q. 1883?

A. 1883.

Q. When did Butler Johnstone assume management of the repairs and works at the works of the Mammoth mine, about?

A. Well, I am not perfectly sure as to the date; it was some time I think towards the end of December.

Q. 1882?

A. 1882.

Q. I ask you to state, Mr. Austin, whether the London Bank of Utah had any conversation with the Salt Lake Foundry and Machine Company touching the discounting of a note; and if so, state the particulars.

A. Well, it didn't result in a transaction, but we had some talk. Mr. Pierpont, and I had some talk about discounting a note that was offered to me for discount, payable to the Salt Lake Foundry Company, drawn by Butler Johnstone.

Q. About when was that?

A. Some time in the beginning of January, I think in 1883.

Q. You may state what communication you made to Mr.
133 Pierpont or what he said to you in regard to the discount of that note.

A. Mr. Pierpont brought the note to me, and asked if I would discount it; I said no, Butler Johnstone was owing the bank enough now, and I didn't care to discount it.

Q. By whom was that note made?

A. It was made by H. A. Munroe Butler Johnstone.

Mr. BROWN: We object to that, that there is better evidence.

Mr. BENNETT:

Q. What, if anything following by way of business transactions or negotiations upon the conversation which you now have detailed?

A. Well, there was nothing that I remember; I simply wouldn't discount the note, and he took it away.

Q. I ask you to state whether Mr. Morris at that time or subsequently, had any connection with that note, or with the negotiation between him and the bank.

A. Well, I have no knowledge of that.

Cross-examination.

By Mr. BROWN:

Q. These transactions between yourself and Morris were with him individually, were they—acting for himself, and not for the——

A. (Interrupting.) You mean the note.

Q. All the transactions that you have stated with Morris?

A. Yes.

Q. In all the transactions you have stated, he was acting for himself and not for the foundry company?

A. Individually, so far as I know, yes, sir.

Q. Not for any other person?

A. Not for any other person, no.

Q. You never had any business with him as the president of the foundry company?

A. None whatever.

Q. Or as any officer of the foundry company?

A. Not to my knowledge.

Q. What was your reason for thinking that he was an officer of the foundry company at that time?

A. Well, I knew that he was president of the company.

134 Q. Are quite sure that you knew of it?

A. Yes, I am quite sure of it.

Q. How did you know it?

A. Well, now, I couldn't tell you just now.

Q. Have you ever attended any meetings of that board?

A. No.

Q. You never saw any signatures of his as president at that time?

A. No.

Q. He never told you so?

A. No, he never told me so.

Q. No other officer of the foundry company ever told you so?

A. No.

Q. You don't know how you did know it?

A. Well, I think one way that I knew it was, that I had seen an advertisement of the company.

Q. You think you saw somewhere, in an advertisement, what?

A. I think I saw an advertisement of the company; I knew he was president because——

Q. The business of the foundry company that you had occasion to revert to was with Mr.——

A. (Interrupting.) Pierpont.

Q. Pierpont; and not with Mr. Morris?

Q. No.

Q. Now, whereabouts did you talk with Mr. Morris on this subject?

A. In his own office.

Q. Who was present?

A. Well, I couldn't tell you; I think there was one of his bookkeepers present; that is to say, he was going backwards and forwards there; I was in quite awhile.

Q. What was the occasion of that conversation?

A. That was when I took Butler Johnstone's note there.

Q. That was the first talk you had with him?

A. That was the first talk; oh, I had spoken to him before; I had spoken to him in the bank in relation to this trustee business.

Q. What had you said to him in the bank in relation to the trustee business?

135 A. I told him—he brought me in his bid for the construction of those furnaces, and my recollection is that I explained to him exactly the condition of the——

Q. (Interrupting.) Just state what you said in relation to the trustee business.

A. Well, I told him that this money was coming from London, and that it was coming by installments; I think of amounts of $5,000 at a time, every three or five days, something like that.

Mr. BENNETT:

Q. To what total?

A. I think it was $30,000; that is my recollection.

Mr. BROWN:

Q. Just state all you said to him.

A. Well, I told him that it was coming in that way, and that in the event of his having done more work than what we had money for,—that is to say, when the money ceased, that he must stop work at once, as we were not going to incur any responsibility whatever personally.

Q. Is that all that conversation that you now remember?

A. I am not sure whether I asked him there or not to reduce his bid a little bit, and we would give him the contract; there might have been something of that kind said to him.

Q. Well, is that all?

A. I think that is all; that is all I can remember.

Q. The next conversation was in his office at the time you went up and got the $5,000 check for the $5,000 note?

A. That's it.

Q. And one of his book-keepers was out and in?

A. Yes.

Q. You said nothing to him in that conversation about the contract, that you now remember?

A. No, I think not; I can't recollect anything that I said to him about it.

Q. When was the next conversation that you had with him?

A. Well, the next conversation I had—well, I had several, but the next I remember was when he came into the bank to inquire as to the payment due on the 5th of March; that is, supposing it was the 5th of March.

Q. Was that on or about the 5th of March?

136 A. Well, no, that must have been before; that must have been toward the end of February.

Q. Who was present at that conversation?

A. Well, there was no one present; there was Selwyn, of course, I was standing in front of the counter, you know; and then there was Selwyn, of course, near by, and my recollection is that while I was showing him as to the payments, standing aside, Cunningham came in, I fancy; that is my recollection.

Q. That was about the end of February, you say?

A. Yes, towards the end of February.

Q. Was Butler Johnstone in the country then, or had he left?

A. Oh, he was in the country then.

Q. What time did he leave?

A. Well, my recollection is that he left about the 1st of March.

Q. Had, at that time, Mr. Montgomery Walker, failed or absconded?

A. Yes, I am sure he had.

Q. You understood so at that time?

A. Yes.

Q. You then knew that he had gone, at the end of February?

A. That Montgomery Walker had?

Q. Yes?

A. Yes, I understood he had.

Q. When did you first learn that fact?

A. Well, now, couldn't tell you as to that, it was some time—well, it might be some time in February, I think.

Q. It was owing to his absconding that the scheme of purchase failed, was it not?

A. Well, I don't know as to that. I couldn't say as to that. He, however, had been paid a large sum of money for Mammoth stock.

Q. Who was he, Montgomery Walker?

A. Montgomery Walker, yes.

Q. Had been paid a large sum?

A. He had been paid, yes.

Q. When was it that he absconded?

A. Well, now, I couldn't tell you for a certainty; it was before that, anyhow.

137 Q. Some time in January?

A. Well, I should be inclined to think it was in February some time.

Q. And he took away a large sum of money that was destined to go into the—that was intended to go into his scheme of purchase, did he not?

A. Well, I couldn't say what it was destined for; I will explain to you how it was, if you like.

Q. Yes, if you please.

A. Well, it was simply that he had an interest with Bowers, and he sold this interest a number of times over.

Q. And left with the funds?

A. And left with the funds.

Q. Wasn't this the way, that there was a large amount of money that had been deposited with him to apply on the payment of this contract?

A. Oh no.

Q. And that he left with that?

A. There was nothing in that.

Q. That wasn't so, eh?

A. That wasn't so.

Q. You remember testifying on this subject before the third district court in the case of Morris against the Mammoth Mining Company?

A. Yes, sir.

Q. Didn't you in that case testify that the reason why the scheme of purchase failed was that Montgomery Walker had absconded with

these funds in his hands which were to be paid upon that contract, or that in substance?

A. Well, I think not; I think, of course, no doubt, he injured the thing by selling that stock, you know he got 18,000 pounds, I think.

Q. 18,000 pounds that he absconded with?

A. Yes, he was paid 18,000 pounds for stock in the Mammoth Mining Company from Ottoe Fitzgerald; I don't know how many others.

Q. Ottoe Fitzgerald was one of the intended takers, was he?

A. Yes, I believe so.

Q. Now, in that conversation with Morris, did Morris take this contract in his hands?

138 A. You are referring now to the conversation in the bank?

Q. Yes.

A. No.

Q. How much of it did you read to him?

A. Only as referred to the payments.

Q. About how many lines?

A. Well, might be three, or might be four.

Q. Three or four lines?

A. Yes sir; it might even be less than that.

Q. There was no possibility of his seeing the other provisions of the contract at that time?

A. Not at that time.

Q. Did you have any other conversation with Mr. Morris?

A. Yes, I had several.

Q. When was the next one after that?

A. Well, he was coming out and into the bank, and I met him sometimes on the street, and we talked; but the next time that we had any conversation—well, in the bank would be a few days prior to the next payment being due..

Q. When would that be?

A. Well, that would be 35 days from the 5th of March—about the 9th of April, it would be some time——

Q. (Interrupting.) What was the conversation at that time?

A. —toward the end of March. Well, simply as to how the payment was getting along.

Q. What was it—what was said and what did you say?

A. Well, now, I remember telling him as to that payment that—well, there was some $1,400 short, I think, of that payment, on account of the exchange; they figured 7,000 pounds to be $35,000, well, it wasn't now, I am not clear as to whether I told him that all the payments had been made, or simply the $35,000 less this difference of exchange between the par and the $5 a pound had been paid, I am not positive as to that.

Q. Now, have you stated substantially all the conversation you had with him about the contract?

A. Well, all that I can recall within any degree of certainty.

Q. Now, Mr. Austin, how many times have you been examined and testified with regard to this subject of Morris' knowledge of that contract?

139 A. This is the third time I think.

Q. Twice, both in the third district court?

A. Yes.

Q. In the case of Morris *vs.* The Mammoth Mining Company?

A. Yes, both times.

Q. Now, did you not, on the last time that you testified on that occasion—you remember the time of testifying the last time I presume?

A. Yes, sir.

Q. Did you not that last time say that the only time that you talked with him about the contract was at the time that you went up with the note for the $5,000 and that you had no other conversation?

A. No; I think not.

Q. Wasn't the question put to you directly, as to whether at the bank at one time you showed him the contract, or talked about the contract, and did you not say explicitly that you didn't show him the contract?

A. No, I did not; there was a discrepancy, but that wasn't it.

Q. What was the discrepancy, as you remember?

A. Well, it was as to whether I spoke of the contract upon seeing him about the note, when I took up the note.

Q. You testified that you did, didn't you?

A. The last time I said that—to my recollection, I had said that I had spoken of the contract.

Q. At that time?

A. At that time, yes.

Q. And didn't you add that that was the only time you ever spoke of the contract?

A. No, I think not.

Q. Or that in substance?

A. No, I think you are mistaken about that.

Q. Isn't that the effect of your testimony the last time you testified?

A. No, I think not.

Q. Now, I will put the same question to you as to the first time you testified in the third district court: didn't you testify in substance then that you never showed him the contract in the bank?

140 A. Well, that is not my recollection of it.

Q. And that you never talked about the contract in the bank?

A. I said—yes, that I left the bank; I said nothing about the contract while presenting that note for the $5,000.

Q. Didn't you, in the first time you testified in that case in the third district court, say that you spoke of the contract at the time that you went up with the $5,000 note, and got the $5,000 check, and at no other time, or that in substance?

A. You are talking now of the second examination or the first?

Q. First examination in the district court.

A. Well, that is not my recollection of it.

Q. You remember, of course, being examined in both those trials?

A. Oh, yes, quite well.

Q. You remember whether Mr. Morris had other business in the bank on this occasion at the end of February or 1st of March?

A. This is when he was making inquiry about payments?

Q. Yes.

A. I don't think he had any other business.

Q. Did he occasionally have business there in connection with this operation?

A. No, he had no business there; when he got the checks, don't you know, he paid them through the Deseret bank.

Q. The accounts of this outfit that was running the works down at Tintic were kept with the London Bank of Utah, were they not?

A. The books?

Q. The accounts, not the book-.

A. No, Cunningham kept the accounts, Cunningham checked all the bills; I had nothing to do with it.

Q. The matter was passed to the credit of the Mammoth Mining Company, was it not?

A. Oh, yes.

Q. The product of the operations down there?

A. Yes.

Q. Under the management, whatever it was, of both Bowers and Johnstone, and yourself and Cunningham as trustees, and all of you?

141 A. Up to the first of November; up to the contract of the first of November; then it was changed.

Q. Passed to the credit of the Mammoth Mining Company, was it not?

A. I don't think it was passed to the credit of the Mammoth Mining Company under the contract of the first of November.

Q. After the first of November, steadily on, as long as Butler Johnstone remained here, wasn't——

A. (Interrupting.) That is not my recollection.

Q. —the matter credited to the Mammoth Mining Company on the books of the London Bank of Utah?

A. You mean as a matter of fact?

Q. As a matter of fact.

A. Yes, it went to the credit of the account.

Q. I don't care anything about what the contract was; the contract speaks for itself, I am asking for what took place.

A. Yes, it went to the credit of the Mammoth Mining Company.

Q. And even after Butler Johnstone left, as long as there was any matte coming from that operation?

A. Yes.

Q. It was credited to the Mammoth Mining Company?

A. Yes.

Q. Where are those books now?

A. They are in our vault in Kansas City, awaiting shipment to London.

Q. The books of the London Bank of Utah?

A. Yes.

Q. They are not within this jurisdiction, of Utah?

A. No, I don't think so; I have got all of them.

Q. What is the probability of their being produced on the trial of this cause at Provo next fall?

A. You can have them if you want to pay all the expenses of shipment.

Q. From where?

A. From Kansas City here, and back to Kansas City.

Q. During that time they will be in Kansas City, will they?

A. I can't say for a certainty.

Q. You now expect they will go?

142 A. To London, yes.

Q. To London, upon orders from there?

A. From the official liquidator, yes sir.

Q. This sum $5,000 that you have entered here in the pass book which has been produced, was also entered on the account of the Mammoth Mining Company in the books of the London bank, was it not?

A. Oh, dear, no.

Q. Was not the account which you have referred to, here, at the page open, where you find the $5,000 duplicated in favor of the Mammoth Mining Company on the books of the bank?

A. It was not.

Q. I refer now to the item of December 15, 1882, deposited matte $1,758.70. Wasn't that item also credited to the Mammoth Mining Company?

A. Well, not "also." It was credited to the Mammoth Mining Company, of course.

Q. Wasn't it credited to the Mammoth Mining Company on the books of the London bank?

A. Yes.

Q. And also credited to Mr. Johnstone on the books of the London bank?

A. Yes, that 1,758, but not the $5,000.

Q. So far as that 1,758 is concerned, you keep a duplicate account?

A. Duplicate account.

Q. Double debit and double credit?

A. Yes, sir.

Q. Take the next item of matte, December 27th, that also was duplicated?

A. Same routine, yes.

Q. Same as the item of December 23d?

A. Same routine.

Q. The item of 29th of December, the matte, was also duplicated, was it not?

A. Same routine.

Q. The 30th also was duplicated, was it not?

A. Same routine.

Q. And the item of the 30th, was it not?
A. No.
Q. That wasn't duplicated?
A. No.
143 Q. But the others were duplicated in that account?
A. Yes, now, I might say, instead of——
Q. (Interrupting.) No, I don't ask for any explanation about it. Now, where did you first talk with Pierpont on this subject?
A. I first talked with Pierpont of it when he was standing in front of the counter of the London bank.
Q. You and he alone?
A. Well, Selwyn, of course, would be there attending to his duties.
Q. Selwyn was behind the counter at work?
A. That is to say, I suppose he was; of course, I have no distinct recollection of his being there.
Q. Did you show Pierpont this contract at that time?
A. No, I did not.
Q. What did you say to Pierpont?
A. He asked me if I would discount the note; I said no, I didn't care to, Butler Johnstone, at that time, was owing us enough without increasing his liability any more, or words to that effect.
Q. When next did you talk to him?
A. I haven't any recollection of any more conversation.
Q. That is the only conversation you remember about it? Did you go down there to the foundry works at one time?
A. Never on Butler Johnstone's business; I went down on my own business sometimes afterwards.
Q. What do you mean by your own business, some private business outside?
A. Well, after the collapse there, don't you know, they were owing me some money.
Q. Did you go down there with Butler Johnstone?
A. No, no, not to my knowledge.
Q. Never went down there with Butler Johnstone?
A. I never went anywhere with Butler Johnstone to my knowledge.
Q. Did you ever show this letter to Pierpont?
A. No, I didn't.
Q. Of December 11, 1882?
A. No.
Q. Did you ever show it to Mr. Morris?
A. No, I did not.
144 Q. How long do you say you acted as trustee?
A. Well, my recollection is, from the beginning of November to the time Butler Johnstone came, which I think was some time in the beginning of December.
Q. From whom did you receive your authority to act as trustee?
A. Well, from James Montgomery Walker.
Q. Did you know his handwriting?
A. I do know his handwriting.
Q. You do not, or do?

A. Yes, I do.

Q. How long had you been acquainted with it?

A. I never saw him in my life.

Q. How long had you been acquainted with his handwriting?

A. Well, at that time I doubt very much whether I was acquainted with his handwriting; it was done by cable and under cipher.

Q. That was your first authority?

A. That was my first authority.

Q. Was the cable in cipher?

A. In cipher ciphered under the——

Q. (Interrupting.) Have you preserved that cable in any way?

A. Well, now, I don't know whether it is preserved or not; it might probably be amongst the bank papers; I should think not.

Q. If so, it is at Kansas City?

A. If so, it is at Kansas City.

Q. Not where you can now put your hands upon it?

A. No, it is not.

Q. Can you remember the language of that cable as translated in English?

A. No, I don't remember the language, either; I know the gist of it.

Q. Well, what is your best recollection as to the gist of it?

A. Well, the gist of it was that they were to advance money for the construction of six furnaces, provided I personally became responsible for the construction of them.

Q. And who signed it?

145 A. It was signed, "Torrence."

Q. Torrence?

A. Torrence, yes.

Q. Said, substantially, that "they," or "he" which—or "we"?

A. Well, I don't think there was e-ther; it was simply this "Will advance $30,000." Of course cabling at that time was very expensive.

Q. Who was Torrence?

A. Well, Torrence I understand to be James Montgomery Walker.

Q. He was a man with different names was he?

A. No, I don't think he had different names; but it was a cipher.

Q. It was a cipher?

A. Yes.

Q. Who told you that it was James Montgomery Walker?

A. Well, Butler Johnstone is the man I think told me.

Q. After he came here?

A. After he came here.

Q. So that when you got this cipher, you really didn't know whom you were acting for?

A. That is so.

Q. You had no means of knowing whom you were acting for until after Johnstone came?

A. Well, yes, I knew that Walker was interested, before Butler Johnstone came here.

Q. Well, who Torrence was, you say you didn't know?

A. No.

Q. Do you remember when it was Johnstone told you that?

A. That it was Torrence?

Q. That Torrence was Walker.

A. Well, Butler Johnstone told me that after he came here, when we began talking about the cables.

Q. How much money had you in hand when you made this arrangement with Morris?

A. Well, I couldn't tell you, but it wasn't very much.

Q. $5,000?

A. I think about $5,000.

Q. How much did you have come to your hands at al-
146 during that trusteeship as you call it?

A. How much came?

Q. Yes, to your hands.

A. Well, now, I can't say for certainty now, but my recollection is somewhere about—it might be $15,000; it might be less; it might even be more.

Q. Did you after that correspond with Montgomery Walker?

A. Did I correspond with him?

Q. Yes.

A. After Butler Johnstone came here? Never.

Q. How did you get his handwriting?

A. Well, I got his handwriting in this way; it was sent to me in a letter by a Mr. Hargraves that he had sold his claim to—sold his interest to.

Q. When was it you first saw his handwriting?

A. Oh, well, it was after that—well, now, I am not sure.

Q. After what?

A. I am not sure as to it, but it was long after the trustee business; it was some time in February, I think.

Q. In February, that was; then, after he had absconded?

A. It might be in March; it was just previous to his absconding, don't you know; he had given this letter, and a day or two after that I supposed he cleared out.

Q. You never corresponded with him directly then yourself?

A. Well, only cabling Torrence.

Q. He never wrote you a letter over his sign manual?

A. Well, only this order to deliver certain stock to a third party.

Q. To Hargraves?

A. To Hargraves, yes.

Q. One order?

A. One order.

Q. He gave you an order to deliver certain stock to Hargraves?

A. Yes.

Q. That is all——

A. (Interrupting.) That is the only letter I ever had, to my recollection.

147 Q. That is all you know about his handwriting?

A. That is all I know about his handwriting, yes.

Q. You never saw him write?

A. No, I never saw him write.

Q. Never saw the man?

A. Never saw the man.

Q. And you saw something purporting to be an order signed J. Montgomery Walker?

A. Yes, sir.

Q. That is your knowledge of his handwriting?

A. My knowledge of the man.

Q. Who was your correspondent in London in connection with this business?

A. Well, there was really no correspondent; all my correspondence was done simply by cabling to Torrence.

Q. You said you heard in February that Montgomery Walker had absconded; whom did you hear it from?

A. I heard that through the bank.

Q. Through what bank?

A. Through the London Bank of Utah.

Q. Your correspondent, then, on that subject, was the London Bank of Utah?

A. Yes.

Q. What particular person represented the bank there?

A. Well, the directors were stationed there, and the secretary.

Q. Which one of the directors informed you of that fact?

A. It was the secretary.

Q. Who was that?

A. Arthur W. Wells.

Q. Arthur Wells informed you that Montgomery Walker had absconded with these funds?

A. Well, not with these funds; he told me that he had absconded.

Q. Who told you he had absconded with the funds?

A. Well, the first notice I had was a notice from the solicitors, as they are called there, of the estate of Lord Otto Fitzgerald, making a claim——

Q. (Interrupting.) What were their names?

A. Well, now, I couldn't tell you.

Q. Or their address?

148 A. Well, I couldn't tell you, but I believe—they have sent notice to several people, so that their address must be in town.

Q. Had you corresponded with any of the other of these intended or would-be purchasers of the Mammoth stock in London?

A. Well, after Walker disappeared from the scene, I had some correspondence with Goodhart.

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Q. When did you first correspond with Goodhart?

A. Well, I should think towards the end of February, or in March.

Q. Up to that time your only man that you had corresponded with was this man Torrence, by cable?

A. Was this man Torrence, by cable, and I had written Butler Johnstone one letter.

Q. And he had written you?

A. Yes, he wrote me.

Q. In how many installments did you receive this $15,000 that was transmitted to you as trustee?

A. Well, now, I couldn't tell you; it might be four, might be five; might even be less; I couldn't tell you as to that; I had definite instructions how to draw, but I am not sure now.

Q. How far apart were they?

A. Well, I think they were to be every seven days, I think.

Q. What were your instructions as to how to draw?

A. Well, I was to draw so much every seven days, I think.

Q. How much?

A. Well, I can't tell you.

Q. How did you get your instructions?

A. By cable.

Q. Signed Torrence?

A. Signed Torrence.

Q. And you drew every seven days?

A. I drew every seven days.

Q. Did you cash the drafts yourself at the bank?

A. No, didn't cash them at all; I got advice of the payment before I did anything.

149 Q. You collected it?

A. I collected it.

Q. How long would it take you to make one of those collections?

A. Fifteen days; might be 15 or 16 days; you see the draft went forward, then when it was paid the advice was cabled.

Q. Then that $1,500 didn't get there until away along in February?

A. Well, didn't you know, we started before we spoke to Morris; then it came every seven days.

Q. Do you know how much you did receive and have on hand by the time that Butler Johnstone came to town?

A. Well, of course it was all paid out by the time Butler Johnstone came; well, my recollection is, as I said, it was about $15,000 I received; after that, I may state, the drafts were refused payment.

Q. After Butler Johnstone came?

A. About the time he came here.

Q. Refused to pay the trustee drafts?

A. They refused to pay the trustee drafts.

Q. When did you first know of the existence of these contracts Mr. Bennett asked you about, between the different stockholders of the Mammoth Mining Company and Bowers?

A. Well, a very few days after the drawing of the first.

Q. You never knew of any contract between the company and Bowers whatsoever?

A. No, I never knew.

Q. Never was any, so far as you know, was there?

A. Not so far as I know.

Q. Was you interested in that contract of Bowers?

A. No.

Q. Never had any interest?

A. No.

Q. Didn't you take a part of an interest in the contract?

A. I had no part of an interest.

Q. None whatever?

A. In none of the contracts.

Q. Did you go in as a party, joining with Bowers, by a private arrangement between yourself and Bowers?

A. Not at all; Bowers made me a promise that I should have a part of the result.

150 Q. What part?

A. Well, I couldn't tell you now.

Q. Was it in writing?

A. Yes, it was in writing.

Q. Do you remember the date of that writing?

A. Well, should say it was some time in December or January, some time along there.

Q. December or January, what?

A. Well, it would be December, 1882, or January, 1883.

Q. Was that the first contract?

A. That was the first contract, I believe. Oh, you mean the first contract between the stockholders and the——

Q. (Interrupting.) Yes, sir.

A. Oh, that was a year before.

Q. Well, didn't he give you a part of that—give you a writing to it?

A. I don't know as to whether he gave me any promise for some of that or not. I have an idea that he gave me a promise for a certain number of shares at a consideration of a dollar, or something like that.

Q. Wasn't you to have a certain portion of that contract and an interest in it with him?

A. No, no, none of that.

Q. And wasn't there a writing to that effect?

A. Not that I know of.

Q. When did you begin to be trustee?

A. Well, my recollection is some time in the beginning of November.

Q. And when did you end?

A. Well, after Butler Johnstone came here, a few days, some time in December, I think.

Q. Were the payments on this contract made through your bank?

A. Yes.

Q. And if I remember rightly, they were to be so by the terms of the contract?

A. Yes; well, they were to be made at the bank.

Q. You say that Bowers assigned a part of his interest in that contract to Montgomery Walker?

A. No, I don't say that; I say—well, I think the part of the first contract—I think he assigned that to Butler Johnstone and Montgomery Walker, I fancy, jointly.

151 Q. Did you know anything of the existence of papers to that effect?

A. Yes, sir; yes, I saw that assignment.

Q. From Bowers to Walker and Johnstone?

A. Yes, I think it was that way, but then—the one against the first of November was different.

Q. Do you know what became of those papers of assignment?

A. Well, yes; that first assignment was sent by me, I think, to Butler Johnstone, and was the commencement of my correspondence.

Q. With him?

A. I think so.

Q. When was that sent to him?

A. Well, now, that would be shortly after the execution of it.

Q. Did you ever have any correspondence with Montgomery Walker on that subject?

A. Did I ever have?

Q. Yes.

A. Not to my knowledge.

Q. The contract of November first—was there any assignment of that to Walker or Johnstone or either of them?

A. Well, I understand that there was an assignment of a half interest in that to Butler Johnstone only.

Q. How do you understand that?

A. Well, now, I remember Butler Johnstone talking with me about it.

Q. See any papers to that effect?

A. Well, I wouldn't state positively that I had.

Q. Bowers talk with you about it?

A. I don't remember Bowers talking about it.

Q. Did Johnstone tell you that he had a half interest with Bowers?

A. I remember Johnstone talking about it, because Johnstone talked with me about what portion he ought to have for what he was doing.

Q. But they left Montgomery out?

A. Well, apparently he was left out.

Q. And he left them out the next month. How do you understand he was interested in furnishing money for this
152 enterprise unless he was interested as a partner with Bowers, or as an assignee with Bowers?

A. You mean Montgomery Walker?

Q. Montgomery Walker.

A. Well, I will tell you how far. Butler Johnstone was going to make a deal with Walker, and probably on the best terms he could make; I don't know.

Q. That is the way you understood it?

A. Yes—but, oh, I remember more than that now.

Q. Tell it.

A. Montgomery Walker was owing money to Butler Johnstone, and I remember very well what Butler Johnstone told me about his indebtedness.

Q. He was owing money to Butler Johnstone?

A. Yes.

Q. Prior to November first?

A. Prior to November first; I can tell you the circumstances.

Q. Was that the reason that Walker was entrusted with the funds?

A. Oh, I don't know anything about Walker being entrusted with the funds; that didn't come under my knowledge.

Q. But you did know that Walker was the man that was furnishing the money for you as trustee?

A. Only under the signature of Torrence.

Q. But you knew——

A. (Interrupting.) Yes.

Q. When Johnstone came here?

A. I was told.

Q. In December, you then knew that Walker had been furnishing you the money as trustee?

A. Yes, exactly, on Butler Johnstone's information.

Redirect examination.

By Mr. BENNETT:

Q. Mr. Austin, do you remember the occasion of the first trial of the suit of Ellias Morris against the Mammoth Mining Company in this court?

A. Yes, I do.

Q. The third district court?

A. Yes, sir.

153 Q. You were examined as a witness, I believe?

A. I was.

Q. You were present during the trial?

A. Yes, sir; I think part of the trial, anyway; perhaps the great part.

Q. Do you remember whether the testimony in that case was taken by a short-hand reporter?

A. Yes, I remember it was taken by a short-hand reporter; that is my recollection; I was trying to recall his name now.

Q. I was going to ask you whether you knew by whom.

Mr. BROWN: Do you want to prove all that by him? Can't you prove it better by me—by my admission on the trial?

Mr. BENNETT: I can prove it better by him.

A. Well, I think it was Adam Patterson.
Q. Do you know where the notes of that trial are?
A. No, I don't.
Q. Adam Patterson is dead, is he not?
A. Adam Patterson is dead.
Q. Were you a witness on the second trial of the case of Morris against the Mammoth?
A. Yes, it was the second; I think I missed the third—the second, yes.
Q. By whom were you called in that case at that trial?
A. By the Mammoth Mining Company.
Q. Was or was that not the trial where a nephew of Mr. Morris was found to be on the jury and the trial was suspended?
A. Yes, that is the one.
Q. You were not then called by The Mammoth Mining Company, the defendant? It is not very material, the Mammoth Mining Company never got any witness on the stand at all, I think; the case was suspended?
A. Oh, now, I beg your pardon; I thought you were asking me the question as to who subpœnaed me there—who had me there. No, I wasn't, I was called there by Mr. Morris,—by the plaintiff.

Recross-examination.

By Mr. BROWN:

Q. You were cross-examined, however, by the counsel for the Mammoth Mining Company on that second trial?
A. I was, yes.
154 Q. And by them also interrogated as to what transpired between you and Morris at the time that you went up with the $5,000 note?
A. Yes, that is my recollection.
Q. And as to Morris' knowledge of the contract?
A. Probably.
Q. That is your recollection, isn't it?
A. Yes, I think that was—yes, that is my recollection.
(Signed) EDWARD AUSTIN.

(Title.)

Interrogatories to be propounded to and answered by the Hon. H. A. Munroe Butler Johnstone, of London, England, as a witness on the part of the defendant.

First. What is your name, age, occupation, and where do you reside?
Second. Do you know the parties to this action, named in the title hereto, or either, and which of them?
Third. Have you been in the Territory of Utah, and when, and how long did you remain?
Fourth. *Do* you at any time and about when acquire a knowledge of the existence of an agreement dated on or about the 7th

day of January, 1882, between James A. Cunningham, Samuel McIntyre and William McIntyre of the one part, and William H. H. Bowers of the other part, relating to a sale or proposed sale of stock of the Mammoth Mining Company?

Fifth. Did you at any time, and if so when, acquire a knowledge of the contents of said agreement?

Sixth. Do you know of another agreement, between the same parties, relating to the same subject-matter, and bearing date on or about the 1st day of November, 1882?

Seventh. If you answer the last question affirmatively, please state whether you was in Salt Lake City, Utah, when said agreement was negotiated and made, and whether you took any part, and what part, in negotiating said agreement.

Eighth. What, if any, interest did you have in negotiating the last-named agreement, and in the agreement when concluded and in the subject-matter of the agreement?

Ninth. Was any assignment made to you by Wm. H. H. Bowers of any interest in or under said agreement, or in the subject of the agreement?

155 Tenth. Was such assignment in writing? If yes, can you produce either the original or a duplicate, or copy of the same?

Eleventh. If you can produce either an original or a copy state which it is, and annex the same to your answer hereto as an exhibit, and if a copy is given please state in your answer whether the copy is a full and correct copy.

Twelfth. If you cannot either produce either on original or give a copy, state to the best of your knowledge where an original or copy can be found, and whether it is under your control or direction.

Thirteenth. If you cannot give the original or a copy of said assignment, state its contents.

Fourteenth. Was any work done after November 1, 1882, and up to the 1st day of June, 1883, in operating the mines of the Mammoth Mining Company, at Tintic, Juab county, Utah, or in erecting a refinery, furnaces and other improvements on the land of said company? If yes, please state what was the general nature of the work done and improvements made.

Fifteenth. Who, during the time named in the last interrogatory, was the general manager of said business?

Sixteenth. If you say you managed said business, please state whether you did so with the consent of Wm. H. H. Bowers, and what if any arrangement you made with him in regard to the general management.

Seventeenth. If you managed the business, during the time specified or any part of that time, please state whether such management was under said agreement of November 1st, 1882.

Eighteenth. Who had the occupation of the mines and other works at Tintic, after November 1st, 1882, and until June 1st, 1883?

Nineteenth. Did the Mammoth Mining Company, after November 1st, 1882, and prior to June 1st, 1883, do any work or make any

improvements on said Tintic properties, or do anything, and if so, what, in the direction, management or control of work or improvements on said properties?

Twentieth. Who was the foreman at the works and mines from November 1st, 1882, to February 1st, 1883, and who em-
156 ployed him, and who was the foreman at the works and mines after February 1st, 1883, while you was manager, and who employed him?

Twenty-first. Who employed and discharged men and kept or directed the keeping of the accounts with the men at the mines and works?

Twenty-second. Did the Mammoth Mining Company during the time named have any men employed at the mine or works in Tintic?

Twenty-third. Who contracted for and furnished material and machinery?

Twenty-fourth. Had you any authority from the Mammoth Mining Company, to make contracts in its name or behalf, and did you make any contracts in its name or behalf, or represent to any person that you was the agent of or acting for said company?

Twenty-fifth. Did you at any time, and about when, compose and cause to be published in newspapers in Salt Lake City, Utah, an article relating to said Tintic business, and can you say whether or not the following printed slip is the same article?

The Mammoth mine.—We are desired by Mr. Butler Johnstone to state he is the representative of the new purchasers of the Mammoth mine. The vendors who are represented by Mr. J. S. Cunningham and Messrs. Samuel and William McIntyre, of this city, have a contract with Mr. W. H. H. Bowers, who in his turn, has surrendered a large portion of his interest to Mr. Butler Johnstone and his friends, retaining only a portion of his contingent interest in the property.

We further understand that although it is only stipulated in the contract that a small portion of the purchase-money is to be paid to the vendors monthly, it is the intention of the purchasers to pay the whole purchase-money in the spring, and to stock the mine on the London stock exchange. Mr. W. H. H. Bowers, who, by his contract with the vendors, bound himself to run the business in his own name and at his own expense, has surrendered this power to Mr. Butler Johnstone, who has voluntarily undertaken to pay the debts legitimately incurred in the business since Mr. Bowers' original contract, and assumed on himself the whole responsibility for all future debts incurred in the management of this property.

Twenty-sixth. Did you at any time, and if yes, about when, make any contract or agreement with the plaintiffs, Taylor,
157 Romney and Armstrong, for lumber and building material for the Tintic business? If so, please state with which of said firms it was made, and what the contract or agreement was.

Twenty-seventh. Did you make said contract in your own behalf or as agent for and in behalf of the Mammoth Mining Company?

Twenty-eighth. What if anything was said by you, as to your

status in making said contract, or as to whether you was acting for yourself or said company?

Twenty-ninth. What knowledge or information did said firm of Taylor, Romney and Armstrong have at the time of or before contracting or while furnishing material, of your relation to the Tintic business and for whom you was acting?

Thirtieth. Did you deal with said firm in the name of the Mammoth Mining Company, or in any way represent you was acting for said company?

Thirty-first. Did you at any time and, if so, about when, make any contract with Elias Morris, for work and material to be done and furnished by him, or and for the erection of a refinery, smelters, boarding-house, etc., at Tintic? If yea, was said agreement verbal or in writing, and if in writing, please annex as an exhibit to your answer the agreement or a copy thereof, and if a copy state whether it is a full and correct copy. If you cannot give the original or a copy, state to the best of your knowledge who has either and where it may be found. If you have not the original or a copy, or if the agreement was verbal, state the terms of the agreement in full, including prices to be paid for the work.

Thirty-second. Did said Morris do any work or furnish any material under said agreement? If yea, state generally what he did.

Thirty-third. Did you make any payments to said Morris on account of work and material? If yea, please state about how much, how made, whether by check or cash, and if by check, whose check. Also whether any receipts for such payments were given, and if so to whom they were given.

Thirty-fourth. At the time of making any contract with said Morris, what if anything was said by you as to whom you were contracting for, and whether for yourself or the Mammoth Mining Company, and did you in any way state or hold out to him that you was acting for said company?

Thirty-fifth. Did you have other dealings with said Morris,
158 relating to said Tintic business, and what knowledge did Morris have, at or prior to the time of making the contract herein referred to, or while doing the work or furnishing the material, of your relations to said business at Tintic, and by whom and on whose credit the business was conducted?

Thirty-sixth. Did you at any time contract for, or order of the Salt Lake Foundry and Machine Company, in Salt Lake City, any castings, or engage said company to construct or repair any machinery or do any work for or in the Tintic business? If yea, please state the terms and conditions of the contract or orders.

Thirty-seventh. Did you make such contract or orders in your own name, or in the name of some other person or party?

Thirty-eighth. Did you make to said company any statement that you was an agent of or acting for the Mammoth Mining Company?

Thirty-ninth. What knowledge or information did said foundry and machine company have at, or prior to said contract or orders,

of your relation to the Tintic business, and as to whom it was contracting with?

Fortieth. Do you know any other matter or thing material to this your examination, or which may be of benefit or advantage to the parties at issue, or either of them? If yea, state the same as fully as if specially interrogated in respect thereto.

BENNETT, HARKNESS & KIRKPATRICK,
Attorneys for Defendant, Mammoth Mining Company.

(Title.)

Cross-interrogatories of the defendant, The Salt Lake Foundry and Machine Company, to be propounded to and answered by H. A. Munroe Butler Johnstone, a witness on behalf of the defendant, Mammoth Mining Company, with the understanding that the said machine company, on the trial of this cause may also put in evidence the answers of said witness, if it deem proper, to the cross-interrogatories of the plaintiff herein.

First. Did not the Salt Lake Foundry & Machine Company do work for you individually and also work, at your instance for the Mammoth Mining Company?

Second. Didn't you order the Salt Lake Foundry & Ma-
159 chine Company, through its superintendent, Mr. Thos. Pierpont, to make some machinery for you about February, 1883, which was sent to Montana Territory, or somewhere North?

Third. Didn't you say to Mr. Pierpont, at the time and on the occasion referred to in the last question when you ordered the machinery for the North, "I want you to make this machinery for me individually, not for the Mammoth Mining Company, and make it as cheap as you can for I am poor, and the Mammoth Company is rich," or words to that effect or language conveying that meaning?

Fourth. What was said by you at the time and on the occasion referred to in the last two questions to Mr. Pierpont?

R. B. TRIPP,
Attorney for Defendant, Salt Lake Foundry & Machine Co.

(Title.)

Cross-interrogatories to be propounded to, and answered by H. A. Munroe Butler Johnstone, of London, England, a witness on behalf of the said defendant.

First. If in answer to the "fifteenth" interrogatory propounded by the defendant you answer that you was during that time the general manager of said business, state whether or not you were such with the knowledge and consent of the said defendant.

Second. During the time you so managed said business who was the president of said company, and who composed its board of directors?

Third. Was not James A. Cunningham president of said company, during all of said period, and were not Samuel McIntyre

and William McIntyre during the same time members of its board of directors?

Fourth. Did you not so act as manager of said business with the knowledge and consent of each of the said persons named in the last preceding cross-interrogatory?

Fifth. If in answer to the "eighteenth," direct interrogatory you state that you had the occupation of the mines and their works at Tintic, during the period named in said interrogatory, state by whose permission you had such occupation, and by what means you held the same, whether under a lease or otherwise.

160 Sixth. If you say in answer to the "twenty-third" interrogatory by defendant that you contracted for and furnished material and machinery, state further whether or not such contracts made and material furnished were for yourself individually, or for some other party, and if for another for whom.

Seventh. If you state in answer to direct interrogatory "fourteenth" that a refinery and furnaces were erected and other improvements made on the lands of said company, state for whom they were erected and made, and to whom all such improvements belonged.

Eighth. In the printed slip referred to in direct interrogatory "twenty-fifth," it is stated you represented the "new purchasers of the Mammoth mine." Who were those new purchasers? Give the name and residence of each, and state what it was they had purchased. Was it the mining property itself or an interest therein, which they had bought, or was it stock in the Mammoth Mining Company? And if the latter, how many shares in the aggregate had they purchased?

Ninth. If in reply to the "thirtieth" direct question you say that you did not deal with said firm in the name of the Mammoth Mining Company, nor in any way represent that you were acting for said company, then state in whose name you did deal, for whom you were acting, and whom you did represent as your principals. Did you deal for yourself individually, and if yea, state whether or not you are personally indebted to the said firm of Taylor, Romney and Armstrong for the lumber furnished by them in pursuance of said contract? If it is not your personal indebtedness, please state whose it is.

Tenth. In contracting with Elias Morris for work and material for the construction of the refinery, furnaces, etc., for whom did you act? And if there is any balance remaining due Morris for labor done, and material furnished under that contract, who owes it?

Eleventh. What were your relations to the business at Tintic during the period the work done by Morris was progressing? Upon whose credit was the business conducted? State the name and place of residence of each and every of the parties, whether the same be natural persons or corporations.

Twelfth. Did you not and during the time of all these transactions with Morris represent to him that the parties for

161 whom you were acting were the actual owners and con-

trollers of a majority of the stock of the Mammoth Mining Company?

WILLIAMS & YOUNG,
Attorneys for Plaintiffs.

(Title.)

In answer to the interrogatories propounded to me in the above suit, I make oath and say as follows:

In answer to the first interrogatory I say Henry Alexander Munroe Butler Johnstone, forty-seven years of age, residing at Nice, in France; in answer to the second interrogatory I say I am acquainted with most of the parties to the suit by name and with some of them personally, viz: Elias Morris, Amos Howe, J. J. Halpin, the firm of Taylor, Romney and Armstrong, the Salt Lake Foundry and Machine Company, and the directors of the Mammoth Mining Company, and probably others mentioned in the title to the suit.

In answer to the third interrogatory; I have been in the Territory of Utah, for about four months, from December, 1882, to March, 1883.

In answer to the fourth interrogatory, I say, "yes," in January, 1882.

In answer to the fifth interrogatory, I say, yes, at the time.

In answer to the sixth interrogatory, I say, yes.

In answer to the seventh interrogatory, I say, no.

In answer to the eighth interrogatory, I say, I did not negotiate it, but the interest I had in it was originally the same as in the contract of the 7th January, 1882, viz: one-third.

In answer to the ninth interrogatory, I say, I cannot remember whether there was at that time any written assignment by W. H. H. Bowers to me, but I had this third interest under written agreement with him.

In answer to the tenth interrogatory, I say, I refer to my answer to the ninth.

In answer to the eleventh interrogatory, I say I refer to my answer of the ninth interrogatory; and further put in a copy of the assignment by W. H. H. Bowers to me of a third interest in his
162 contract of the 7th January, 1882. (A copy of said contract is hereto annexed, marked Exhibit A.)

In answer to the twelfth and thirteenth interrogatories, I say that I refer to my answer to the ninth interrogatory, I say yes. Ten smelting furnaces were completely erected, others partly so, refinery works were erected, concentrators set up for washing the tailings, boarding-house for the workmen, brick kiln erected and timbering and development at the mine, and other subsidiary improvements, all on a large scale. In answer to the fifteenth I say, I was.

In answer to the sixteenth, I say it was with the full consent of W. H. H. Bowers, and that the only arrangement with him with regard to the general management was his expressed willingness to help me in every way whenever requested by me to do so.

In answer to the seventeenth interrogatory, I say that such management by me was not under the said agreement of November 1,

1882, but was arranged between us shortly after my arrival at Salt Lake City.

In answer to the eighteenth interrogatory, I say that W. H. H. Bowers had the occupation and management after the 1st November, 1882, up to the time mentioned in my last answer, viz: shortly after my arrival at Salt Lake City.

In answer to the nineteenth interrogatory, I say, no.

In answer to the twentieth interrogatory, I say I cannot remember the names of the foremen at the mines and works up to the time that Mr. Plummer came from Montana to take the superintendence at both the mines and the works, and it was I who employed him.

In answer to the twenty-first interrogatory, I say, it was the foremen employed by W. H. H. Bowers whom I naturally took over until the arrival of Mr. Plummer, to whom I gave full power to employ whatever foremen and others he thought advisable.

In answer to the twenty-second interrogatory: I say, no.

In answer to the twenty-third interrogatory, I say, that most of the large firms in Salt Lake City contracted for and furnished material and machinery and amongst them most of the parties to this suit.

In answer to the twenty-fourth interrogatory, I say, no.

In answer to the twenty-fifth interrogatory, I say, yes, and the printed slip is the same article and was sent by me to the newspaper at the time it appeared.

163 In answer to the twenty-sixth interrogatory, I say, that I remember contracting with the plaintiff named, but I cannot remember exactly with which member of it, and although I cannot remember the exact terms of our contract the general nature of it would be the same as that with all the other contractors, viz: that I represented parties in London who were anxious for the development of the mine so as to transact the business on the London stock exchange, and had promised me to send out working capital to pay for the erection of the works and that they could look to their source for their payment in the event of the proceeds of the matte not enabling me to discharge their claim in full. I further add by way of explanation that this was my positive belief, and that in holding this language to the different firms and contractors in Salt Lake City, I was only acting under instructions, which I had every reason to believe were *bona fide*, given me by the firm of Walker, Russell and Company of London, previous to my starting from London for Salt Lake City, and who I knew had procured promises of large sums of money from important clients in England, contingent on the reports from the mine, especially from the expert chosen by them to inspect the mine, being satisfactory. Walker, Russel & Co. failed for four hundred thousand pounds sterling, of which I know forty thousand pounds was money raised and paid by the aforesaid clients to that firm for the specific purpose of advancing and securing this Mammoth business.

In answer to the twenty-seventh interrogatory, I say that I made the said contract in my own behalf on the ground and basis mentioned in my answer to the last interrogatory.

In answer to the twenty-eighth and twenty-ninth interrogatory I refer to my answer to the twenty-sixth interrogatory.

In answer to the thirtieth interrogatory, I say, no.

In answer to the thirty-first interrogatory, I say that soon after my arrival, and on taking the management, I made various contracts with Elias Morris for all kinds of work to be done on the property, but I cannot remember whether the said agreements were, any of them, in writing, but I rather think they were all verbal, and I cannot at this distance of time remember the prices or terms of the agreements.

In answer to the thirty-second interrogatory, I say, much and good work, building smelters and refinery works, brick kilns
164 and generally all mason and stone work on the property and further helping in every way in his power and advancement of the business.

In answer to the thirty-third, I say, that I remember paying the said Elias Morris from time to time small installments of money in proportion as I was enabled to do so from the proceeds of the matte sold and believe it was invariably done by my check on the London Bank of Utah, although I cannot remember what the specific sums were, and receipts for all such payments would be and were naturally given.

In answer to the thirty-*fifth* interrogatory, I refer to my answer to the twenty-sixth interrogatory, and I repeat that I never could have told him that I was acting for the Mammoth Mining Company, meaning by that the incorporated company in Utah, the defendants, as I have already sworn, and as I believed was thoroughly understood by all parties concerned, whilst I had the management of the property out there the parties for whom I was acting were parties in England, not yet incorporated, but to be incorporated later on as an English company, to take over the property upon the fulfilment of the remaining conditions of W. H. H. Bowers' contract of the 1st November, 1882.

In answer to the thirty-fifth interrogatory, I must refer to my answer to the last interrogatory, and say further, that I had other dealings with Elias Morris with reference to the boarding of the workmen on the property.

In answer to the thirty-sixth interrogatory, I say, yes, and must refer to my answer to the thirty-fourth interrogatory.

In answer to the thirty-seventh interrogatory, I say, yes, I did in my own name with the explanations given in my answers to the twenty-sixth and thirty-fourth interrogatories.

In answer to the thirty-eighth interrogatory, I say no.

In answer to the thirty-ninth interrogatory I must refer to my answers to the twenty-sixth and thirty-fourth interrogatories.

In answer to the fortieth interrogatory, I refer to my answers to the twenty-sixth and thirty-fourth interrogatories, which I believe covers the whole ground in dispute between the parties.

(Signed) H. A. M. BUTLER JOHNSTONE.

165 (EXHIBIT A.)

Know all men, by these presents, that I, William H. H. Bowers, of Salt Lake City, Utah Territory, for and in consideration of the sum of fifty thousand dollars, lawful money of the United States, to me in hand paid by H. Munroe Butler Johnstone, of London, England, do by these presents, sell, transfer, assign and set over unto the said H. Munroe Butler Johnstone, an undivided one-third part and portion of and in a certain contract for the sale to me of three hundred and ninety-two thousand nine hundred and fifty-five shares of the capital stock of the Mammoth Mining Company (a corporation duly organized and existing under the laws of Utah Territory) and for the temporary transfer to me of the possession of the property of the said Mammoth Mining Company, which said contract was made and executed by Samuel McIntyre, William McIntyre, James A. Cunningham and Philip T. Van Zile, to me the undersigned, and bears even date herewith, and said H. Munroe Butler Johnstone is to have and to hold under this assignment all my right, title and interest of, in, and to the undivided one-third of said contract subject however to all the covenants conditions and payments therein mentioned, said Butler Johnstone to be responsible for one-third of the payments and liabilities required of me by the said contract, and upon such basis he is admitted to participate in said contract, and to be the owner of the one-third part thereof and to be entitled to demand and receive from Samuel McIntyre, William McIntyre, James A. Cunningham and Philip T. Van Zile the one undivided third of the stocks and property mentioned in said contract, and to be delivered to me, upon compliance with the conditions and covenants mentioned.

In witness whereof, I have hereunto set my hand and affixed my seal this 7th day of January, A. D. 1882.

[SEAL.] WILLIAM H. H. BOWERS.

TERRITORY OF UTAH, } ss:
County of Salt Lake, }

Be it remembered that on this seventh day of January, one thousand eight hundred and eighty-two (1882) before me J. Fred. Corker, a notary public in and for said county and Territory, duly commissioned and qualified, personally appeared William H. H.
166 Bowers, personally known to me to be the same person who executed the foregoing instrument, in writing and whose name is signed thereto, who acknowledged to me that he executed said instrument freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal at office in Salt Lake City, county and Territory aforesaid on the said 7th day of January A. D. 1882.

[L. S.] J. FRED. CORKER.

London Bank of Utah, Limited.

SALT LAKE CITY, *January* 26, 1882.

I certify to having carefully compared the above with the assignment of W. H. H. Bowers to H. Munroe Butler Johnstone deposited in escrow with the bank, and found it the same in every particular.

E. AUSTIN.

Endorsed: Exhibit A, referred to in answer to interrogatory 11. I certify this to be a correct copy of my agreement. H. A. M. B. J.

(Title.)

In answer to the cross-interrogatories of the plaintiff in the above suit propounded to me, Henry Alexander Munroe Butler Johnstone, I make oath and say as follows:

In answer to the first cross-interrogatory I say for me, yes, but for the Mammoth Mining Company, no.

In answer to the second cross-interrogatory, I say, yes.

In answer to the third cross-interrogatory, I say, no.

In answer — the fourth cross-interrogatory, I say without any doubt that the following must have been the list of my remarks at the time. The machinery for Montana is on my own private account and I want you to make it as cheaply as possible, for I am poor. The orders for the other machinery are on account of the Mammoth mining business (not the Mammoth Mining Company) and I think it very likely I added this latter business (not company) can afford to pay much better price than I can.

(Signed) H. A. MUNROE BUTLER JOHNSTONE.

167 (Title.)

In answer to the cross-interrogatories propounded to me, Henry Alexander Monroe Butler Johnstone, in the above suit, I make oath and say as follows:

In answer to the first cross-interrogatory, I say, yes.

In answer to the second cross-interrogatory, I say, that the president and board of directors of the said company were to the best of my knowledge the persons mentioned in the third cross-interrogatory.

In answer to the fourth cross-interrogatory, I say, yes, with their knowledge and consent so far as they could be concerned.

In answer to the fifth cross-interrogatory, I say, that it was by the permission of W. H. H. Bowers, who held possession of the property by virtue of his arrangements with the Mammoth Mining Company.

In answer to the sixth cross-interrogatory, I refer to my answer to the twenty-sixth and thirty-fourth direct interrogatories.

In answer to the seventh cross-interrogatory, I refer to my answer to the twenty-sixth and thirty-fourth direct interrogatories.

In answer to the eighth cross-interrogatory, I say, that the "new purchasers of the Mammoth mine" referred to in the slip, were

Walker, Russell & Co., of nine, Old Broad street, London, stock-brokers, and their clients. It is of course impossible for me to know who these clients individually were, inasmuch as although previous to my going out to Utah, I, in company with Mr. Walker, saw a great number of his clients in reference to this business, the negotiations with all of them were suspended awaiting my and Plummer's report, and it was only on the receipt of those reports, and whilst I was in Utah, that his negotiations with them were brought to a conclusion.

I have since heard that from one client alone, the late Lord Ottoe Fitzgerald, of Carlton house, Terrace, London, he received forty thousand pounds in cash for the purpose of being remitted to Salt Lake. Neither Ottoe Fitzgerald nor any of these clients of Walker, Russell & Company, received anything in return for their money; what they did receive was promises of shares and what they thought they were purchasing were shares of the Mam-
168 moth Mining Company, at a price which was to pay the contract price of the shares, viz: one dollar and seven cents plus, a sum sufficient to pay for the erection of the necessary works and to provide the working capital of the concern. This price varied from two and one-half dollars to four dollars per share. I, myself, previous to going out, bought and paid for three thousand pounds sterling, value of these shares at three dollars per share, which constituted the half of the sum of six thousand pounds, which Walker, Russell & Co., cabled to the London Bank of Utah, in August, 1882. I have a very distinct recollection of this transaction inasmuch as I had difficulty in raising this money by pledging the shares as security. As I have stated in the answer to the twenty-sixth direct interrogatory I have reason to know that in the aggregate the sum raised by Walker, Russell & Co., for this purpose amounted to forty thousand pounds sterling cash, at the least.

In answer to the ninth — interrogatory, I say, must refer to my answer to the twenty-sixth and thirty-fourth direct interrogatories.

In answer to the tenth cross-interrogatory, I say, I must equally refer to my detailed answers and explanations given to the 26th and 34th direct interrogatories.

In answer to the eleventh cross-interrogatory, I refer as in the above.

In answer to the twelfth cross-interrogatory, I say, no, but refer equally to my answers to the 26th and 34th direct interrogatories as the explanation of the exact state of the case.

(Signed) H. A. MUNROE BUTLER JOHNSTONE.

The foregoing is all the testimony given in the case.

(EXHIBIT 1.)

Notice

Is hereby given, that any man employed by the Mammoth Mining Company, who shall frequent any whisky, beer, or spirit shop,

which has been, or may be set up in the vicinity of its property—except such as may hereafter be duly authorized by the company—will immediately receive his time-check and cease to be employed by the company. Further, no man who has once been dismissed by the company will ever be employed by it in any capacity again.

169 Every man has a right to frequent what houses he chooses, but the company has an equally indisputable right to employ such men as it chooses. Every possible regard will be paid by the company to the comfort and well-being of the workmen employed by it, but it will not for a moment be tolerated that patronage shall be extended, out of the earnings paid by the company, to those irresponsible persons who have settled down on the very borders of the company's property, for the express purpose of preying on the employees of the company. *The workmen of this company have already had occasion to see with their own eyes the disastrous effects of drink on those on whom their comfort and actual feeding depend*, and the company is determined to do its duty in preventing the repetition of such scenes.

Any workman disagreeing to these rules is required to signify his disagreement thereto forthwith. Every workman who continues in the employ of the company, or who shall hereafter be employed by it, is understood to agree to these rules *as a condition of his employment*, and any violation of them will be regarded as a breach of contract.

W. H. H. BOWERS.
H. A. MUNROE BUTLER JOHNSTONE.

Mammoth smelting works, January 15th, 1883.

(EXHIBIT 2.)

Rules of Mammoth Company.

(To be continued.)

1. Any man once discharged from the service of the company will never be employed again, — any capacity by the company.
2. Any man found the worse for liquor will be immediately discharged. Any man disobedient to orders will be immediately discharged.
3. Every man employed by the company will be placed under the orders of his proper gangman and foreman.

W. H. H. BOWERS.
H. A. MUNROE BUTLER JOHNSTONE.

170 (EXHIBIT 3.)

By Order.

As soon as the new boarding-house is completed and all our own men (*i. e.*, the men on our pay-roll, with the exception of the carpenters) turn in there, the wings of the house are to be occupied—

the one side by the carpenters exclusively, the other by the masons exclusively. (The masons will then quit Mr. McIntyre's house.) Two little houses to be built on each side of the wings will be occupied, the one side by Mr. Trowbridge, the other by Mr. Slater, and a stove put in each, new ticks, one to each two men (in the wings as well as in the boarding-house) will be dealt anew and clean, dry hay provided for them particularly.

N. B.—From the date of the opening of the new boarding-house, 1 dollar a day will be charged each man for board and lodging according to the usual custom.

H. A. MUNROE BUTLER JOHNSTONE.

1 January, 1883.

(EXHIBIT 8.)

THE MAMMOTH SMELTING WORKS.

General manager and superintendent,
W. H. H. BOWERS
and
H. A. MUNROE BUTLER JOHNSTONE.

Head smelter,
D. STRINGER.

(Foreman of the smelting works,)
JOHN WILSON.

Assay-st,
W. E. JACOBS.

Chief engineer and head of the grading department,
W. A. WILBOR.

Telegraphist and postmaster and freight agent,
J. MACNAUGHTON,

Store-keeper and head of the trucking department,
OLIVER MCMILLAN.

171 Head carpenter,
W. L. SLATER.

Cashier, accountant and secretary,
H. A. M. BUTLER JOHNSTONE, *pro tem.*

Quartermaster,
JOHN WILSON.

Not on the regular establishment.

Contractor and builder,
Mr. DECKER.

Foreman of the masons,
Mr. GEORGE TROWBRIDGE,
From the firm of Elias Morris of Salt Lake.

(EXHIBIT 4.)

Pay-roll.

Heading—Work on the water ditch; Mammoth mill job.

W. H. H. BOWERS.
Pay-roll.

(EXHIBIT 9.)

Letter—Heading.

" Office of

MAMMOTH MINING COMPANY.

General office: Salt Lake City, Utah.

Location of mine and reduction works, Tintic mining district, Utah.

Addressed to D. T. Attwood, relates to brick.

(Signed) W. H. H. BOWERS, *Manager.*

(EXHIBITS 5, 6 AND 7.)

Pay-rolls—Original headings—(in large type).

" MAMMOTH MINING COMPANY—Pay-roll."

Endorsed on back was the same.

172 (EXHIBITS 10 AND 11.)

Headed

" MAMMOTH SMELTING WORKS."

Dated November 16, and Dec. 4, 1882.

J. A. Cunningham, Esq.

DEAR SIR: Letters contain directions to purchase lumber and iron for new furnaces, glass gauge for saw-mill, etc.

(Signed) D. STRINGER, *Superintendent.*

(EXHIBIT 13.)

MAMMOTH SMELTERS, TINTIC, *March* 19, 1883.

T. Pierpont, Esq., sup't Salt Lake foundry and machine shop, Salt Lake City.

DEAR SIR: Please send 12 grate bars more, same as last sent.

Yours respectfully, JOHN W. PLUMMER, *Manager.*

(EXHIBIT 14.)

MAMMOTH SMELTING WORKS,
TINTIC, *January* 29, 1883.

Mr. T. Pierpont, sup't Salt Lake City foundry.

DEAR SIR: We have sent to-day per express, pattern of loose pinnion, keyway $3\frac{3}{4}$ in bore for shaft, please cut and send to us as soon as possible and oblige,

MAMMOTH MINING COMPANY.
D. STRINGER, *Sup't.*

173 (EXHIBIT 15.)

TINTIC, *March 20th*, 1883.

T. Pierpont, Esq., sup't Salt Lake foundry.

DEAR SIR: Please send for use of refinery $3\frac{1}{4}$ plunger for steam-pump, also the loan of 2 jack screws for a few days.

Yours respectfully, JOHN W. PLUMMER, *Manager.*

(EXHIBIT 16.)

Salt Lake foundry:

GENTLEMEN: Please cut the pipe sent to-day, per Mr. Poose's instructions.

JOHN W. PLUMMER, *Manager.*

(EXHIBIT 17.)

Mr. Pierpont, Salt Lake foundry.

DEAR SIR: Could you send down to the Mammoth Tintic, on Monday morning by express, 1 plate iron $\frac{5}{16}''$ x 40″ x 42″ with 42″ sweep, also following tools, two riveting hammers, 1 hand hammer, 1 laying-up hammer, 1 holding-up hammer with short shaft, 1 screw punch with single-ended wrench, 50″ rivets $1\frac{1}{4}''$ x $\frac{5}{8}''$, a few rivets $\frac{1}{2}''$ x $\frac{5}{8}''$ and 1 $\frac{3}{4}''$ x $\frac{5}{8}''$ also $2\frac{1}{2}$ doz. $\frac{5}{8}$ bolts $1\frac{1}{2}''$ long.

Your boiler-maker requires a boy named Balsem, to go down on Monday morning. Please send me separate account of their time so that I can remit.

Yours truly, JOHN W. PLUMMER, *Manager.*

(EXHIBIT 18.)

MAMMOTH SMELTERS, *March 8th*, 1883.

T. Pierpont, Esq., sup't Salt Lake foundry, Salt Lake City.

DEAR SIR: Through mistake a letter intended for you was addressed to Salt Lake Iron Works & Co., on March 6th. Please get it and give order your immediate attention, anything on
174 order you can't fill, please hand over to Messrs. Halpin & Co., who will send it.

Yours respectfully, JOHN W. PLUMMER.

(EXHIBIT 28.)

Office of

MAMMOTH MINING COMPANY.

General office, Salt Lake City, Utah.

Location of mine and reduction works, Tintic mining district, Utah.

SALT LAKE CITY, UTAH, *Oct. 26th*, 1882.

To whom it may concern:

There is due C. O. Bahr the sum of five hundred and ninety-four $\frac{36}{100}$ ($594.36) on various accounts for provisions, etc., furnished men in employ of Mammoth mine. I have no doubts but the company will be in condition to pay all this within next sixty days, as we are now building six more furnaces and from the proceeds of this and other monies expected from England I expect to meet all the companies' obligations within time named. I regret very much that circumstances prevent our paying the same now, but such is the case we cannot.

Respectfully, yours,

W. H. H. BOWERS,
Manager Mammoth Mining Co.

(EXHIBIT E.)

Order on foundry to contract between Cunningham, *et al.*

(EXHIBIT 35.)

Package—18 vouchers—covering transaction with C. O. Bahr, to the firm.

"AUGUST 31, 1882.

W. H. H. Bowers, Dr., to C. O. Bahr.

(Item —. Received payment in full.)

175 (EXHIBIT 31.)

Packages of checks, payable to C. O. Bahr, on London Bank of Utah (Limited) in part signed and countersigned by W. H. H. Bowers, and part signed by H. A. Monroe Butler Johnstone.

(EXHIBIT 29.)

Contract between Doctor T. Atwood, of one part, Mammoth Mining Co. of the other part—(for brick).

(Signed) DOCTOR T. ATWOOD. [SEAL.]
W. H. H. BOWERS, *Manager*. [SEAL.]

(EXHIBIT 35.)

Voucher for brick—

W. H. H. Bowers Dr. to D. T. Atwood

—and check on London bank in part signed and countersigned by Bowers, some signed by H. A. Munroe Butler Johnstone, one by J. A. Cunningham, trustee, November 4, 1882, payable to D. T. Atwood.

(EXHIBIT 37.)

Package 11 vouchers, W. H. H. Bowers Dr. to J. S. Grow.

(EXHIBIT 36.)

Checks on London bank payable to J. S. Grow, in part signed and countersigned by W. H. H. Bowers and in part signed by H. A. Munroe Butler Johnstone.

(EXHIBIT 39.)

Voucher, Austin and Cunningham, trustees, Dr. to Elias Morris, Nov. 17, 1882, $1,144.80, and check on London bank for same amount, signed J. A. Cunningham, trustee.

(EXHIBIT 32.)

Bowers sign and countersign check on London bank, payable to Thomas & Co.

(EXHIBIT 34.)

W. H. H. Bowers, check on London bank, payable in part to Thomas & Co. and J. R. Nichols, agent—former countersign.

176 (EXHIBIT 33.)

Voucher,

Mammoth Mining Co. Dr. to J. R. Nichols, agent.

(EXHIBIT 38.)

MAMMOTH MINING COMPANY.

Any person having claims against this company for past accounts is requested to send in a statement of the amount due and particulars of the claim to the company's office, 101 Main street, addressed to the accountant of the Mammoth Mining Company on or before Monday, 22nd January, 1883. This notice has no reference to the past month account. The pay-day at the Mammoth mine and smelt-

ing works for the month of December will be Monday the 10th instant.

H. A. MUNROE BUTLER JOHNSTONE.

(EXHIBIT 40.)

Same as Exhibit 34, differing only in amount. November 13, 1882.

(EXHIBIT 41.)

Package—Utah Central railway shipping bills; marks and destination, J. A. Cunningham, trustee, consignor, E. Morris.

(EXHIBIT 42.)

Vouchers—Austin and Cunningham, trustees, Dr. to Elias Morris, December 6th, 1882.

(EXHIBIT 43.)

Elias Morris, check on Deseret National bank, December 23, 1882, to order of London bank for $5,000.

(EXHIBIT 44.)

Account—Messrs. W. H. H. Bowers and Butler Johnstone, Dr. to Elias Morris, from January 31st, 1883, to March 27th, 1883, $15,671.80.

177 (EXHIBIT 46.)

Assignment dates January 7, 1882, by W. H. H. Bowers to H. A. Munroe Butler Johnstone of a third interest in contract Exhibit 45.

(EXHIBIT 45.)

This agreement, made and entered into on this, the seventh day of January, A. D. 1882, by and between Samuel McIntyre, William McIntyre, James A. Cunningham and Phillip T. Van Zile, all of Utah Territory, parties of the first part, and William H. H. Bowers, of Salt Lake City, Utah Territory, party of the second part, witnesseth:

That, whereas said parties of the first part are the owners of and now hold three hundred and ninety-two thousand, nine hundred and fifty-five shares of the capital stock of the Mammoth Mining Company, a corporation duly organized and existing under the laws of Utah Territory. Said shares being owned and held by said parties as follows, to wit: Samuel McIntyre 159,388 shares, William McIntyre 159,388 shares, James A. Cunningham 73,969 shares, and Phillip T. Van Zile 210 shares. And whereas said parties of the first part propose to contract with said party of the second part for the sale of their several shares of stock aforesaid in case this agreement

is performed by the said parties, to transfer the same to said party of the second part.

Now, therefore, in consideration of the premises and one dollar to them paid the receipt whereof is hereby acknowledged and in consideration of the covenants and agreements herein, the said parties of the first part agree to release to said party of the first part the temporary possession of the party of said Mammoth Mining Company, and in consideration of the covenants and agreements hereinafter specified to be done and performed by said party of the second part, the said parties of the first part do each for himself to the extent of his interests in said stock, covenant and agree to sell and deliver, assign and transfer unto said party of the second part, three hundred and ninety-two thousand nine hundred and fifty-five shares of stock aforesaid, and to procure for and grant and deliver to said party of the second part the quiet and peaceable possession and absolute control of the mines, mills, and all the property real, personal, and mixed of and belonging to said company, and
178 upon payment by said party of the second part to said parties of the first part, of the first payment of the twenty-five thousand dollars hereinafter mentioned, to turn over to said second party the said temporary possession and exclusive control of all the property of said company, to be held by said second party, as long as said second party continues to faithfully fulfill, and carry out the provisions of this contract, or until forfeiture be made by the non-payment of any one payment herein specified to be made by said party of the second part. It is further stipulated and agreed, that during the pendency and existence of this contract the said party of the second part shall be entitled to name and nominate the directors of said company, and the said parties of the first part three of said directors at the time of executing this agreement, said directors so named to remain as directors of said company, during the existence of this contract. It is further mutually agreed that all wood now at the mill, mines, or works of said company shall become the property of the party of the second part upon payment therefor by said party of the second part on or before the first day of February, A. D. 1882 of ten dollars twelve and one-half cents per cord. And to this end the parties hereto agree to measure and deliver said wood on or before said date, and at any time fixed by said party of the second part, upon ten days notice. Also that all quicksilver on hand at the mill or works of said company shall be and become the property of said party of the second part agreeing to pay to said parties of the first part therefor the sum of forty-two cents per pound on or before the first day of May next, said quicksilver to be weighed and delivered at the time of measuring said wood.

Also three millers, one mortar, eight tappets and one lot of new shoes and dies are to belong to said party of the second part agreeing to pay therefor on or before the first day of May next. At the invoice prices as per invoices to said parties of the first part. It is further agreed that all other personal property, chattels and supplies, now on hand and belonging to said company are to be used

subject to this contract, by said party of the second part, and if said contract is fully complied with by said second party to become the property of said party of the second part. That all the tailings at the mill the property of the parties of the first part are upon the fulfillment of this contract to be the property of the party of the second part. Also all tools, machinery, apparatus, imple-
179 ments, buildings and mills the property of said first parties, on the fulfillment of this contract shall be and become the property of the party of the second part, the said party of the second part to have the possession and control of the same during the continuance of this agreement, or until said second party makes default in some covenant or agreement, or part of this contract. It is further agreed by and between the parties hereto, and in consideration of the promises, and the payments herein stipulated that the said party of the second part is to have possession and control, of all the property of the said Mammoth Mining Company, during the time he shall faithfully keep and perform each and every duty of the covenants and agreements in this contract contained, and may work and operate said mines, mills and property as he deem best (provided the same shall be done in a workmanlike manner;) but in case of any failure upon the part of said party of the second part to keep and fulfill any or all of his said covenants and agreements within the time stipulated, then, and in that case, the possession and control of said property by said party of the second part and all his rights, titles and benefits under and by virtue of this agreement shall cease and be absolutely at an end, and all payments theretofore made and all improvements made by reason of this agreement, shall be and become the property of said Mammoth Mining Company, and it shall be lawful for said company by its superintendent or other officers designated by said company to re-enter, (said party of the second part hereby waiving all notices to quit) and take full and complete possession of all of said property herein mentioned or contracted concerning.

It is further agreed by and between the parties hereto that the proceeds of the mines and property accruing and obtained during the existence of this agreement shall be as fast as obtained by said party of the second part, deposited to the credit of the Mammoth Mining Company, subject to the order of the president of said company, in the London Bank of Utah, at Salt Lake City, Utah. And it is further agreed with reference to said proceeds so deposited that said party of the second part, shall, during the existence of this contract, make out (over his certificates that the same is correct) a full statement of all expenses, together with pay-roll, improvement account, supply account, and expense account, and deliver the same on or before the fifth day of each month to a committee of
180 two, to wit: Samuel McIntyre and James A. Cunningham, on the part of the parties of the first part, who shall audit and approve, or disapprove the same or approve that portion thereof as shall be found to be correct and proper, and upon said approval signified upon said statements, or pay-rolls, in writing signed by said committee, the president of said company shall draw his check

upon said funds so deposited as aforesaid by reason of the proceeds from said property, for the account of said monthly statement, pay-rolls and said expense accounts aforesaid to said Bowers, the party of the second part, provided there is that amount in said bank to the credit of said company, said amount to be used by said party of the second part for the payments of said amounts so approved. In case said committee of two aforesaid named cannot agree upon the matter of auditing said expenses, then the said committee and said party of the second part, they three shall select a third person by a majority vote of the three, and the said committee and the said third person so selected shall by a majority vote decide upon what accounts shall be approved and that disapproved and their decision shall be final. Provided always that said amount so deposited by said party of the second part to the credit of said company, in said bank, may be used in paying the principal due upon this contract, provided it does not reduce said amount below the sum of fifty thousand dollars.

It is further understood and agreed by and between the parties that whereas a certain contract for sale, bond or agreement was on or about the 5th day of August, 1881, made and entered into by some of the parties of the first and H. H. Day, concerning the property herein agreed concerning, which said contract or bond would by its terms expire on or about the 5th day of February, 1882, that this contract or agreement shall in all respects be and the same is made subject to said contract or bond, made and delivered to said H. H. Day, and subject also to the following communication concerning said contract or bond with said Day from said Samuel McIntyre, said communication being in the words and figures following to wit:

SILVER CITY, *Dec. 30th*, 1881.

Capt. H. H. Day, Salt Lake City:

181 If mine is sold and they want thirty days additional time to examine title they can have it by putting up twenty-five thousand dollars before present bond expires.

S. McINTYRE.

It is further agreed that all rights and benefits accruing to said parties of the first part by reason of said agreement with said Day or any one else, and now in existence shall, over and above the sum of six hundred and ninety-six thousand, eight hundred and seventy-five dollars, belong to and be the property of said party of the second part, provided said party of the second part, shall have fulfilled and carried out this agreement in every particular at the date of said rights or benefits accruing. It is also further agreed that all debts and liabilities of the said company now in existence are to be paid and discharged by said parties of the first part except $\frac{17}{250}$ of said indebtedness which amount the said party of the second part agrees to pay, and except as to said seventeen two-hundred-and-fiftieths said party of the second part is to be harmless.

It is further agreed on the part of the party of the second part

that he will on and after the first day of January, 1882, assume and pay all liabilities created after said date, for work, labor and expense of said mines, mills and property of said company.

It is further agreed that all the stock now owned by said parties of the first part shall be upon the execution of this agreement deposited with the London Bank of Utah, in escrow, and said bank is to be custodian thereof until the completion or forfeiture of this contract and the full payment of the sums of money herein agreed to be paid by said party of the second part, said stock is all to be delivered duly assigned to said party of the second part and he is then to be the absolute owner thereof, but until the full payment of all of said sums of money, and the full completion of this contract, no part of this stock is to be delivered or become the property of said party of the second part. That in consideration of the covenants and agreements herein made and entered into on the part of the parties of the first part, the said party of the second part agrees to pay to the parties of the first, at the said London Bank of Utah, or to deposit in said bank subject to their order the sum of six hundred and ninety-six thousand eight hundred and seventy-five dollars as follows, to wit: Twenty-five thousand dollars at the
182 time of making and executing this agreement, fifteen thousand dollars on or before the 1st day of May, A. D. 1882; twenty-five thousand dollars on the 1st day of August, A. D. 1882; fifty thousand dollars on the 1st day of October, A. D. 1882 (upon the three last payments said party of the second part to have five days' grace); ninety-seven thousand dollars on the 1st day of November, A. D. 1882; ninety-seven thousand dollars on the 1st day of December, A. D. 1882; ninety-seven thousand dollars on the 1st day of January, A. D. 1883; ninety-seven thousand dollars on the 1st day of February, A. D. 1883; ninety-seven thousand dollars on the 1st day of March, A. D. 1883; ninety-six thousand eight hundred and seventy-five dollars on the 1st day of April, A. D. 1883; (upon the last six mentioned payments said party of the second part to have thirty days' grace.) And in consideration of the covenants and agreements herein, said party of the second part further agrees to put up and erect in good workmanlike manner two reverberatory copper matting furnaces, each to be of ten to fifteen tons capacity per day, at or near the present stamp mill of the said company, said furnaces to be completed and ready for operation on or before the 1st day of April, 1882; also put up and erect in good workmanlike manner not less than eight and not more than sixteen more reverberatory copper matting furnaces, all to be completed and ready for operation on or before the first day of September, A. D. 1882, all of said furnaces and improvements to be put upon land, the title of which shall at the time of commencing the erection of the same be in the Mammoth Mining Company.

And it is further agreed on the part of the party of the second part, that in case of any failure upon his part to perform any or all of the covenants or agreements to be performed or done on his part at the time and in the manner herein stipulated then and in that case the possession and control of all said property of said company

shall be surrendered to and taken possession of by said company, or said parties of the first part as hereinbefore stipulated, and all monies paid to said parties or either of them or deposited as aforesaid, except the monies delivered, audited and expended by reason of the arrangements hereinbefore mentioned, shall be and become the property and monies of the first part, and all mills, furnaces and improvements made, built or erected and all machinery, apparatus and tools used or on hand for building and operating
183 the same shall become absolutely the property of the said Mammoth Mining Company, and they shall be entitled to take immediate and absolute possession of the same.

In witness whereof, we have hereunto set our hands and affixed our seals on the day and year first above written.

SAMUEL McINTYRE. [SEAL.]
WILLIAM McINTYRE. [SEAL.]
J. A. CUNNINGHAM. [SEAL.]
PHILLIP T. VAN ZILE. [SEAL.]
WILLIAM H. H. BOWERS. [SEAL.]

Signed and sealed in presence of—
JACOB S. BOREMAN.
J. FRED. CORKER.

(EXHIBIT 47.)

Agreement supplemental to contract Exhibit 45.

(EXHIBIT 51.)

Assignment January 22d, 1883.

By W. H. H. Bowers to H. A. Monroe Butler Johnstone of half the profits of contract Exhibit 48.

(EXHIBIT 49.)

Assignment by W. H. H. Bowers, December 6th, 1882, to H. A. Monroe Butler Johnstone of one individual half interest in contract November 1st, 1882—Exhibit 48.

(EXHIBIT 48.)

This agreement, made the first day of November, A. D. 1882, between Samuel McIntyre, William McIntyre and James A. Cunningham, all of the Territory of Utah, parties of the first part, and William H. H. Bowers of the city of Salt Lake, in the Territory of Utah, the party of the second part, witnesseth:

That the parties of the first part own three hundred and forty-one thousand eight hundred and six (341,806) shares of the capital stock of the Mammoth Mining Company, a corporation organized under the laws of the Territory of Utah, in the following proportions, to wit: The said Samuel McIntyre owns one hundred and

thirty-eight thousand, seven hundred and sixteen (138,716) shares, and the said William McIntyre owns one hundred and
184 thirty-eight thousand, seven hundred and sixteen (138,716) shares; and the said James A. Cunningham owns sixty-four thousand, three hundred and seventy-four (64,374) shares; and the said parties of the first part in consideration of the sum of one dollar to them in hand paid by the said party of the second part and of the further payments to be made and conditions to be performed by said party of the second part, as herein provided, agree to sell, transfer and deliver to the party of the second part, said three hundred and forty-one thousand, eight hundred and six (341,806) shares of said capital stock for the sum of six hundred and thirty-one thousand five hundred and two and $\frac{50}{100}$ (631,502.50) dollars, payable as herein provided, and each of the parties of the first part agrees to sell, transfer and deliver to said party of the second part, his portion of said capital stock for his *pro rata* of said sum of $631,502.50 upon the terms and conditions following, which are mutually agreed to by the respective parties, to wit:

That the party of the second pays to the parties of the first part on the execution and delivery of this agreement, the sum of thirty-five thousand dollars, the receipt of which is hereby acknowledged, by the parties of the first part, and the *first* parties of the first part transfer and deliver to the party of the second part, upon such payment, shares of said capital stock, at the rate of one share for one dollar, eighty-seven and one-half cents to the amount of such payment, and the second party hereby acknowledges the receipt of said capital stock, being 18,666⅔ shares.

The parties of the first part deposit in the London Bank of Utah (Limited) in Salt Lake City, Utah, in escrow, the remainder of said capital stock agreed to be sold, for delivery to the party of the second part, when, and in such quantities as he shall be entitled to receive the same under this agreement.

The party of the second part is authorized to take immediate possession of the mining and reduction properties of the Mammoth Mining Company, situated in the Tintic mining district, Juab county, Utah Territory, consisting of the Mammoth Mining mine, mill site, furnaces, buildings, fixtures and all tools, implements, property and appurtenances belonging to said company and appurtenant to or used with its mining properties, and from hence-
185 forth and until some default shall be made on his part, and until the time limited for the full possession of his part, and until the time limited for the full performance of this agreement if no default be made, to retain the possession of such properties, and in his own name and behalf, and at his own expense, to work, manage and operate and improve said properties in a good miner-like manner, and to receive the proceeds of such workings so long as he shall fully comply with the terms of this agreement.

And, whereas, the first parties fearing the working of said mine pending the agreement may tend to decrease the value of their stock, it is further mutually agreed that, so long as this agreement is in existence and said stock of the first parties not fully paid for,

the *pro rata* of the net proceeds of said working, which the stock held by the first parties bears to the whole stock of the company, including the net proceeds of all ores, matte, bullion and refined metals and products of all kinds is pledged for and is to be applied to, the payment of the purchase price of said stock as follows:

At such times and as soon as the gross proceeds of said products are received by the second party he shall deposit the same in the London Bank of Utah (Limited) in Salt Lake City, Utah, subject to the order of Edward Austin; and the second party shall also monthly, and on or before the tenth day of each month, commencing with the 10th day of December, 1882, certify and render an account of all expenses of production, including the expenses of and supplies for mining, smelting, developing the mine and refining, and for repairs and replacements on the property, but not including expenses of new constructures to be erected under this contract, and deliver the same to the said Edward Austin, and Samuel McIntyre and James A. Cunningham, two of the parties of the first part, are appointed a committee and shall within ten days audit and approve the same or so much and such items thereof as may be proper, and disapprove so much and such items thereof as they may find not proper expense charges, and in case they disagree, they and said party of the second part shall agree on and select a competent third person to act with said committee, and the decision of any two of said three persons shall be final. The items and amount of said expense account approved shall be stated and specified by the auditors and thereupon the said Edward Austin shall pay out of the said cross-proceeds to said second party, for the purpose of
186 paying current expense the amount so allowed, and out of the balance of the net proceeds the said Austin shall pay to the parties of the first part the *pro rata* thereof, which the stock held by them during the month in which said proceeds were earned, bears to the whole capital stock of said mining company, and such payment shall be received by the first parties as part of and to apply on the payment of the purchase price of said stock mentioned, to be made at the times hereinafter named.

The balance of said net proceeds shall remain in said bank subject to the order of the said Edward Austin, for the benefit of the parties equitably entitled thereto.

And the first parties agree that, so long as the second party complies with the terms of this agreement, and so long as no default shall be made by him, he shall have the quiet and undisturbed possession of said mining properties, for the purposes and for the time aforesaid, and they will and do hereby guarantee said quiet and undisturbed possession against said mining company its officers and directors.

The second party agrees that he will so soon as practicable, and within one hundred and fifty days from the execution and delivery of this agreement, at his own expense, furnish all the material for and erect and construct and put in good working order on the mill site of said mining company, six smelting furnaces in addition to those now on the property; each furnace to be of the size and

capacity of those now on the property; also refining works and machinery, for the purpose of and suitable for separating and refining the metals in the bullion and matte made by the furnaces at said mine, and of sufficient capacity to separate and refine all metals in the bullion and matte made from ores from said mine by the furnaces now on the property and those which the second party shall erect as aforesaid.

The party of the second part on or before the expiration of one hundred and twenty days from the execution and delivery hereof, shall pay to the parties of the first part the further sum of thirty-five thousand (35,000) dollars and the further like sum of thirty-five thousand (35,000) dollars on or before the expiration of each thirty-five days thereafter (being the payment of thirty-five thousand dollars each thirty-five days) until (including the cash payment now made) said sum of six hundred and thirty-one thousand five hundred and two and $\frac{50}{100}$ dollars is fully paid. All payments
187 are to be made at the London Bank of Utah, (Limited,) in Salt Lake City, to the credit of the parties of the first part.

Upon making each cash payment as aforesaid, the party of the second part shall receive, upon such payment, shares of said capital stock to the amount thereof at the rate of one dollar and eighty-seven and one-half cents per share until one hundred and thirty-nine thousand, eight hundred and six (139,806) shares, including the shares delivered on the execution and delivery of this agreement, shall have been so delivered, and stock so delivered shall be taken from the stock of the parties of the first part, *pro rata*, to their ownership in the whole stock in escrow; but it is expressly agreed that, when stock shall have been delivered or payments as aforesaid until there remains in escrow only two hundred and two thousand (202,000) shares, no further stock, and *on* part of said 202,000 shares shall be transferred or delivered until the whole sum of six hundred and thirty-one thousand, five hundred and two and $\frac{50}{100}$ dollars is fully paid, and when said sum shall have been fully paid the whole stock remaining in escrow shall be transferred and delivered to the party of the second part.

And it is further agreed that, until the stock in escrow has been reduced by delivery on payment to two hundred and two thousand (202,000) shares, the party of the second part may, at any time when he is not in default, in addition to the payments above provided for, pay to the first parties at said bank, further sums of money to apply on said purchase price, but no less sum at one time than shall be sufficient to entitle him to five hundred shares of stock, and receive upon such payments, stock to the amount of each payment at said rate of one dollar and eighty-seven and one-half cents per share, in quantities not less than five hundred shares at any one time.

And it is mutually agreed that if said party of the second part shall fail to erect and complete said six furnaces and said refining works on or before the expiration of one hundred and fifty days after the execution and delivery of this agreement, or shall fail to make any cash payment on said purchase price at or before the

time provided herein, the parties of the first part may at their option consider and declare this agreement terminated, and at their option the same shall from thenceforth be void and of no effect, and thereupon the party of the second part shall immediately give up to the said mining company or any of its agents or officers the pos-
188 session of all the properties of said company, including all additions, improvements and betterments made by the second party, and all said properties, additions, improvements and betterments shall be the property of said company, absolutely free, clear and discharged of any interest or claim of the second party thereto or to the possession thereof, and said company may at once enter upon and remove the second party therefrom and from every part thereof, and the parties of the first part may at once withdraw all stock not delivered on payments previously made from escrow, and said stock, and the parties of the first part shall be free and discharged and released of and from this agreement and all the obligations thereof, except that the second party shall retain such stock as shall have been delivered on payments made before default.

It is also agreed that, though the parties of the first part own their shares of said stock severally, yet this agreement to sell is joint to this extent and effect. The parties of the first part only agree to sell, and the party of the second part only acquires the right to the stock of all the parties of the first part together, and stock delivered on payments made before the completion of the purchase of all the stock shall be delivered *pro rata* from the stock owned by the first parties, and the second party acquires no right to pay for and purchase the stock, or any part of the stock, or any one or two of the first parties, without paying for and taking the stock, or an equal *pro rata* of the stock of all the first parties.

It is mutually understood and agreed that, while the party of the second part is in possession of the mining and reduction properties, under this agreement, the entire business shall not only be conducted by him in his own name and behalf, but that all contracts shall be made, all materials bought and shipped, all pay-rolls, time-checks, receipts, accounts and vouchers made and kept in name of, and upon the sole credit of the party of the second part.

This agreement binds its parties, their heirs, representatives and assigns.

Witness our hands, the day and year aforesaid,

SAMUEL McINTYRE.
WILLIAM McINTYRE.
J. A. CUNNINGHAM.
WILLIAM H. H. BOWERS.

In presence of—
ROBERT HARKNESS.

189 (EXHIBIT 50.)

This agreement made the fifteenth day of January A. D. 1883, between Samuel McIntyre, William McIntyre and James A. Cunningham, parties of the first part, and H. A. M. Butler Johnstone, parties of the second part, witnesseth:

That the parties of the first part, by agreement dated November 1st, 1882, agreed to sell to W. H. H. Bowers, about 341,806 shares of the full-paid capital stock of the Mammoth Mining Company, a corporation of the Territory of Utah, said stock to be delivered and payments therefor to be made in installments at future times, as specified in said agreement which, with the stock, is in escrow with Edward Austin, Esq., at the London Bank of Utah (Limited), in Salt Lake City, Utah, and reference to said agreement is made for certainty as to the terms thereof. The party of the second part hereto, by agreement with said Bowers, has acquired an interest in the subject-matter of said agreement, and has arranged with said vendors for the immediate delivery of 50,000 shares of the stock.

It is now in modification of the agreement, in escrow as aforesaid, agreed between the parties hereto as follows: The party of the second part may at any time take from escrow and pay for at the rates mentioned in the aforesaid agreement, parcels of the remainder of said stock, until the whole stock remaining in escrow is reduced to two hundred and two thousand (202,000) shares, and when said stock shall be reduced by delivery to two hundred and two thousand shares, the party of the second part may at any time take and pay for the whole thereof, but shall not take any part of said 202,000 shares without taking the whole thereof at one time. When the second party hereto shall take the remainder of stock as above provided, he shall in making the last payment be allowed a discount, if the same is taken before the time mentioned in the aforesaid agreement, at the rate of 12 per cent. per annum on all payments made before the times limited in the aforesaid agreement, said discount to be computed at the rate of 12 per cent. per annum from the times of said payments, respectively, to the final times when by the aforesaid agreement the said stock could be paid for and avoid forfeiture, and the total of such discount shall be deducted from the amount of the last payment for said stock at the rate provided in said agreement, the intent being to allow the second party
190 hereto, a discount at said rate for payments made in advance of the final dates of payment mentioned in the said agreement, and that said discount shall not be deducted until the last payment for said stock.

On the margin. It is further mutually agreed that the payment of the 50,000 shares herein referred to be applied on the last payment.

Witnesses. Witness as to Samuel McIntyre and J. A. Cunningham, the words in the margin of this page are added as part of the contract before signing. M. Kirkpatrick. Witness as to the signatures, Wm. McIntyre, H. A. M. Butler Johnstone and W. H. H. Bowers, D. E. Miller.

Witness our hands and seals, the day and year aforesaid.

SAMUEL McINTYRE. [SEAL.]
WM. McINTYRE. [SEAL.]
J. A. CUNNINGHAM. [SEAL.]
H. A. M. BUTLER JOHNSTONE. [SEAL.]

The foregoing agreement is made with my consent and approval.

W. H. H. BOWERS.

Dated, January 17th, 1883.

(EXHIBIT 56.)

Published in Salt Lake Tribune February 3d, 1883.

The Mammoth Mine.

We are desired by Mr. Butler Johnstone to state that he is the representative of the new purchasers of the Mammoth mine. The vendors, who are represented by Mr. James S. Cunningham and Messrs. Samuel and William McIntyre, of this city, have a contract with Mr. W. H. H. Bowers, who, in his turn, has surrendered a large portion of his interest to Mr. Butler Johnstone and his friends, retaining only a portion of his contingent interest in the property.

We further understand that although it is only stipulated to the contract that a small portion of the purchase-money is to be
191 paid to the vendors monthly; it is the intention of the purchasers to pay the whole purchase-money in the spring, and to stock the mine on the London stock exchange. Mr. W. H. H. Bowers bound himself to run the business in his own name and at his own expense, has surrendered this power to Mr. Butler Johnstone, who has voluntarily undertaken to pay the debts legitimately incurred in the business, since Mr. Bowers' original contract, and assumed on himself the whole responsibility for all future debts incurred in the management of their property.

(EXHIBIT 59.)

Utah Central railway shipping bills—Elias Morris, consignee and Butler Johnstone, consignee.

(EXHIBIT 55.)

SALT LAKE CITY, UTAH, 11 *Dec.*, 1882.

To James A. Cunningham, Esq.

DEAR SIR: I hereby beg to tell you that I take, upon myself, personally, all liability which you have personally incurred in ordering material for furnaces and freight of railway connected with the five new furnaces constructed, or in course of construction at the Crismon Mammoth, and I should be obliged if you would kindly tell the furnishers of this material that I will pay them for it, and also the freight, not later than January 10, 1883.

I must also add my sense of obligation, as also that of my col-eagues in London, for your extreme obligingness, not only in undertaking the difficult task of superintending the erection of these new furnaces, but also throughout the complicated transactions between your friends and myself and friends in London.

Believe, yours faithfully,

H. A. MUNROE BUTLER JOHNSTONE.

Specifications of Error.

1. The court erred in admitting in evidence Plaintiffs' Exhibit 1. Schedule of rules regulating dates and contract of employees and in overruling defendant's objections thereto.

2. The court erred in admitting in evidence respectively: Plaintiffs' Exhibits 2, 3, 4, 5, 6 and 7 (pay-rolls) and overruling defendant's objections thereto.

192 3. The court erred in permitting witness Stringer to answer the following questions: "Now I will ask you if the pay-roll for the succeeding months, January, February, March, April, 1883, were in the same form"—and overruling the defendant's objections thereto.

4. The court erred in admitting in evidence Plaintiffs' Exhibits 9 and 10 respectively and in overruling defendant's objections thereto.

5. The court erred in admitting, severally, Plaintiffs' Exhibits 13, 15, 16, 17 and 18 and in overruling defendant's objections thereto.

6. The court erred in permitting witness Stringer to answer the following question: "Do you know of anybody else running these works except the Mammoth Mining Company, and if so who?" and overruling defendant's objection thereto.

7. The court erred in admitting in evidence the brick contract Exhibit 33, and in overruling defendant'- objections thereto.

8. The court erred in admitting in evidence copy of Salt Lake Tribune, containing notice referring to claims against Mammoth Mining Company, and signed by H. A. Munroe Butler Johnstone and in overruling defendant's objection thereto.

9. The evidence was insufficient to justify the decision of the court in the second finding of fact in this, that, the contracting mentioned in said finding was solely by H. A. Monroe Butler Johnstone, and he contracted with the Salt Lake Foundry & Machine Company, for the articles mentioned in said finding, in his own name, and not in the name of the defendant, that said Johnstone was not defendant's agent, and said Salt Lake Foundry & Machine Company had no cause to believe he was such, and through its agents knew he was not such agent, and he had no authority to act for or bind the defendant, and the articles and work he contracted for were used and employed on structures being erected or used by W. H. H. Bowers, or said Johnstone, or by them jointly, and not by said defendant.

10. The evidence was insufficient to justify the decision of the court in the third finding of fact in this, that the evidence shows only that in pursuance of orders from H. A. Munroe Butler Johnstone, that said Salt Lake Foundry & Machine Company furnished

193 the castings, made the repairs and furnished the material mentioned in said finding, and that they were furnished to him, (not to the defendant,) on his special instance and re-

quest, and not on the request or at the instance of defendant—and defendant was wholly a stranger to the transaction.

11. The evidence was insufficient to justify the decision of the court in the fourth finding of fact, in this: That the prices for the material and work mentioned in said finding were not agreed upon between said defendant and the said foundry and machine company, and as to the furnishing thereof, and the prices therefor defendant appears by the evidence to have been wholly a stranger.

BENNETT & BRADLY,
J. G. SUTHERLAND,
Attorneys for Defendant.

The foregoing statement settled and approved by consent of parties this 18th day of September, 1889.

J. W. JUDD, *Judge.*

(Title of Court and Cause.)

Stipulation.

It is hereby stipulated that the time be extended to and including September 16, 1889, for *to* defendant The Mammoth Mining Co. to file and serve notice of its intention to move for a new trial and to prepare and serve a statement on said motion and an appeal from the judgment in favor of Salt Lake Foundry and Machine Company.

Dated July 11, 1889.

ARTHUR BROWN,
Attorney for Salt Lake Foundry Co.

The time for all above purposes extended for ten additional days. September 16, 1888.

ARTHUR BROWN,
Att'y for Plaintiff.

(Filed Sept. 16, 1889.)

194 (Title of Court and Cause.)

Motion for a New Trial.

Now comes the said defendant, The Mammoth Mining Company, and moves the court for a new trial of the issues between it and the defendant, The Salt Lake Foundry & Machine Company, and to set aside the judgment heretofore thereon rendered on the following grounds:

1. Insufficiency of the evidence to justify the findings and decision of the court, and that the decision and judgment are as against law.

2. Error in law occurring at the trial and excepted to by the said defendant, the said Mammoth Mining Company.

Which motion will be based on the record and files herein and on

a statement to be settled to be used on said motion and on appeal from the judgment.

BENNETT, HARKNESS & KIRKPATRICK AND
J. G. SUTHERLAND.

Dated May 22, 1889.

——— ———,
Att'ys for Mammoth Mining Co.

May 22, 1889; service of within admitted.

ARTHUR BROWN,
By E. B. C.,
Att'y for Salt Lake Foundry & Machine Co.

(Filed this 23d day of May, 1889.)

(Title of Court and Cause.)

Record of Proceedings.

This cause came on for hearing before the court sitting without a jury, and witnesses were sworn and examined on the part of said plaintiff and defendant and the further consideration thereof was postponed until to-morrow morning.

J. W. JUDD, *Judge.*

Dated December 3d, 1888.

195 (Title of Court and Cause.)

The further hearing of this trial was proceeded with, and *and* the court now being advised therein orders that the decision herein be postponed until next term of this court.

J. W. JUDD, *Judge.*

Dated December 4th, 1888.

(Title of Court and Cause.)

In this cause the court now being fully advised in the premises orders that a degree be entered herein in favor of plaintiff.

J. W. JUDD, *Judge.*

Dated May 15th, 1889.

(Title of Court and Cause.)

The motion for a new trial filed herein having been duly submitted to the court by respective counsel, and the court now being fully advised in the premises, orders that said motion be and the same is hereby overruled and denied, to which said ruling defendant excepts.

J. W. JUDD, *Judge.*

Dated September 18th, 1889.

(Title of Court and Cause.)

Affidavit and Order.

James A. Cunningham, being duly sworn, says: I am one of the principal officers of the defendant Mammoth Mining Company, and know of the location, condition and value of the property directed by the decree in this action to be sold on foreclosure of lien. The property aforesaid is situated in Tintic valley, is of no use to any one and unused by any one, and cannot without great cost and expense be rendered of any valuable use or in any way productive. Its value as situated does not exceed the sum of $3,000, and the value of the use and occupation of same can not and does not exceed the average sum of $50.00 per year.

J. A. CUNNINGHAM.

Subscribed and sworn to before me, Oct. 18th, 1889.

WM. M. BRADLEY,
Notary Public, Salt Lake Co., Utah.

196 On reading and filing the within affidavit of James A. Cunningham in this matter it is found that the value of the use and occupation of the property, from the date until the delivery of the possession of the property, under the judgment, is $5,000.00, for the purpose of the appeal to the supreme court, and it is directed that this sum be inserted in the appeal undertaking as the penalty thereof for stay of proceedings under paragraph 3641 of the Utah Revised Statutes.

Dated Oct. 22nd, 1889.

JOHN W. BLACKBURN, *Judge.*

(Filed Oct. 22, 1889.)

(Title of Court and Cause.)

Notice of Appeal.

To Arthur Brown, Esq., attorney for Salt Lake Foundry and Machine Co., and to clerk of said court:

Take notice that said defendant The Mammoth Mining Company, appeals to the supreme court of the Territory of Utah from the whole and every part of the judgment rendered and entered in said district court of the first judicial district of said Territory on the 15th day of May, 1889, in the above-entitled action, in favor of the Salt Lake Foundry and Machine Company against the defendant, The Mammoth Mining Company, for the sum of five thousand and eleven and $\frac{54}{100}$ dollars damages, and costs taxed at two hundred and eighty-eight and $\frac{35}{100}$ dollars, and for foreclosure of an alleged mechanic's lien therefore—and also from the whole and every part of the order made and entered in said action denying the motion of said defendant The Mammoth Mining Company for a new trial,

which order was made and entered on the 18th day of September, 1889.

Yours, etc., BENNETT & BRADLEY AND
J. G. SUTHERLAND,
Attorneys for said Defendant, Mammoth Mining Company.

Dated September 19, 1889.

197 Due service of a copy admitted Oct. 25, 1889.
ARTHUR BROWN,
Plaintiff's Attorney.

(Filed Oct. 24, 1889.)

(Title Court and Cause.)

Whereas the defendant, The Mammoth Mining Company, has appealed to the supreme court of the Territory of Utah from the judgment rendered and entered in the above-entitled action in said district court for the first judicial district of said Territory, on the 15th day of May, 1889, in favor of the Salt Lake Foundry & Machine Company against the said Mammoth Mining Company.

Now, therefore, in consideration of the premises and of said appeal we, the undersigned residents and householders of the Territory of Utah, do hereby jointly and severally undertake and promise on the part of the appellant, that the said appellant will pay all damages and costs that may be awarded against it on the appeal, or on a dismissal thereof, not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound.

And whereas, said defendant, The Mammoth Mining Company, has appealed to the said supreme court from the order made and entered in the above-entitled action in said district court on the 18th day of September, 1889, denying the motion of said Mammoth Mining Company, defendant, for a new trial.

Now therefore, in consideration of the premises and of said appeal we, the undersigned, do further undertake and jointly promise on the part of the appellant, that the said appellant will pay all damages and costs which may be awarded against it on the appeal, or on a dismissal thereof, not exceeding the sum of three hundred dollars, to which further amount we acknowledge ourselves jointly and severally bound.

And whereas, the appellant is desirous of staying the execution of the said judgment so appealed from, we the undersigned do further, in consideration of the premises and of said stay, jointly and severally undertake and promise, in the further sum of eleven thousand
198 dollars, being at least double the amount of said judgment, that if the said judgment appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the appellant will pay the amount directed to be paid thereby, or the part of such amount as to which the same shall be affirmed, if affirmed only in part, and all damages and costs which shall be awarded against the appellant upon the appeal; and if the appellant shall not make such payment within thirty days after the filing of the remittitur

from the supreme court, in the court from which the appeal is taken, judgment may be taken on motion of the respondent in its favor against us the said sureties, for such amount, together with the interest that may be due thereon, and the damages and costs that may be awarded against the appellant upon the appeal herein, and we do further jointly and severally undertake and agree, on the part of the appellant, that during the possession by appellant of the real property directed by said judgment to be sold, said appellant will not commit or suffer to be committed any waste thereon, and that if said judgment be affirmed or the appeal dismissed, the appellant will pay the value of the use and occupation of the property from the time of the appeal until the delivery of the possession of said property, pursuant to the judgment, not exceeding the sum of five thousand (5,000) dollars, which sum has been fixed by the judge of the above-named court; and we do further jointly and severally undertake and agree to pay to respondent the amount of the deficiency, if any, arising on sale of the real estate under said judgment.

Witness our hands and seals this 23d day of October, 1889.

MAMMOTH MINING COMPANY,
By WM. McINTYRE, *President*, [SEAL.]
WM. McINTYRE. [SEAL.]
JAMES A. CUNNINGHAM. [SEAL.]

TERRITORY OF UTAH, } ss:
Salt Lake County, }

James A. Cunningham and Wm. McIntyre, being severally duly sworn says, each for himself, I am one of the sureties referred to in and who executed the foregoing undertaking; I am a resident and householder within said Territory; I am worth the amount
199 specified in the foregoing undertaking, as the penalties thereof, to wit, the sum of $16,600.00 over and above all just debts and liabilities, exclusive of property exempt from execution.

JAMES A. CUNNINGHAM.
WM. McINTYRE.

Subscribed and sworn to before me this 23d day of October, 1889.

WM. M. BRADLY,
Notary Public, Salt Lake County, Utah.

I approve of the within undertaking.

JOHN W. BLACKBURN, *Judge.*

(Filed Oct. 30, 1889.)

Certificate to Transcript.

TERRITORY OF UTAH, } ss:
County of Utah, }

I, H. H. Henderson, clerk of the district court of the first judicial district of the Territory of Utah, do hereby certify that the fore-

going are full, true and correct copies of all the papers, orders, record of proceedings, bill of exceptions, and everything pertaining to the above-entitled cause now on file and of record in my office at Provo City, Utah.

Witness my hand and the seal of said court, this 22d day of November, A. D. 1889.

{Seal 1st Judicial District, Territory of Utah, United States of America.}

H. H. HENDERSON, *Clerk*,
By B. BACHMAN, JR., *Deputy Clerk*.

200 In the Supreme Court of Utah Territory.

WEDNESDAY, *January 15th, A. D.* 1890.

Present and presiding: The Honorable Chas. S. Zane, chief justice; the Honorable Thomas J. Anderson, associate justice, and John W. Blackburn, associate justice.

SALT LAKE FOUNDRY & MACHINE COMPANY, Respondent,
vs.
THE MAMMOTH MINING COMPANY, Appellant.

From 1st district. Before Judd, J.

This cause, coming on regularly to be heard, was argued by J. G. Sutherland and C. W. Bennett for appellant and by Arthur Brown for respondent; was submitted and taken under advisement.

SATURDAY, *March 1st, A. D.* 1890.

Present and presiding: The chief justice and all the associate justices.

SALT LAKE FOUNDRY & MACHINE COMPANY, Respondent,
vs.
MAMMOTH MINING COMPANY, Appellant.

From 1st district.

201 This cause having been heretofore argued and submitted, and the court being sufficiently advised thereon, it is now here considered, ordered, and adjudged that the judgment of the district court be, and the same is hereby, affirmed.

Opinion of the court by Blackburn, J.; Zane, Ch. J., Henderson and Anderson, JJ., concurring.

202 TUESDAY, *March 4th, A. D.* 1890.

Present and presiding: The chief justice and all the associate justices.

SALT LAKE FOUNDRY & MACHINE COMPANY, Respondent,
vs.
THE MAMMOTH MINING COMPANY, Appellant.

In this cause counsel for appellant prays the allowance of an appeal from the judgment of this court heretofore rendered to the

Supreme Court of the United States and asks that the amount of a bond to be given thereon be fixed. Whereupon it is ordered that such appeal be, and hereby is, allowed and the amount of said bond is hereby fixed at $12,000.

203 In the Supreme Court of the Territory of Utah.

SALT LAKE FOUNDRY AND MACHINE CO., Respondent,
vs.
THE MAMMOTH MINING CO. *et al.*, Appellants.

BLACKBURN, *J.:*

This action was originally brought by George W. Taylor *et al.*, as plaintiffs, to foreclose a statutory lien against the defendant company. The respondent was a defendant as holder of another lien. The case of the original plaintiffs having been disposed of, the respondent is in effect plaintiff. It filed a cross-complaint for its lien, the appellant put in an answer, and the cause was heard by the court below without a jury and judgment rendered for the respondent, from which judgment this appeal is taken. The cross-complaint alleges that the respondent, a corporation, delivered to the appellant, a corporation, castings and did work and labor in constructing refineries, furnaces, etc., at the request of the appellant, in its mining and milling property; that the materials were furnished and the work and labor done on the property of the appellant, and the amount and value thereof is not denied, but it is denied
204 that this was done at the request of the appellant.

The evidence tends to prove that the materials and work were furnished at the request of one Bowers, who was a director and secretary of the appellant company, and one Johnstone, represented to be the general manager of the company; that the mining operations and the work when this labor was done and their materials were furnished were carried in the name of the appellant company, the pay-rolls of the men and the regulations for the conduct of the work were in its name, and the proceeds of the mine were transferred to its credit, and the material furnished and labor done by the respondent were charged to it, and the whole proceedings in working the mine and making the improvements were carried on to all appearances in the name and by the authority of the appellant company. Its president was sometimes there, its secretary and office were there, and one or two of its directors resided there.

We think there was, if not a preponderance — evidence, enough to justify the court below in finding that these materials were furnished and this labor performed at the request of the appellant; but the contention of the appellant is that it is not liable for the labor done and material furnished by the respondent because it had a contract with another party to have this work done and these materials furnished and pay for the same, and this contract was with Bowers, a director, stockholder, and secretary of the appellant company, and that the contract was between him and certain stockholders of the appellant company and consented to by it.

If this was a private agreement between certain stockholders of appellant as to who should pay for improvements made in its
205 property, made in its name and for its benefit, it will not avail to defeat the claim of the respondent unless notice of this agreement was given to the respondent before the materials were furnished and labor done that it would not be liable for these materials and labor, although done in its name.

On this point the evidence is conflicting, and the court below found for the respondent or it could not have given judgment in its favor. We think the evidence fully justifies his finding.

The errors assigned in reference to the admission of testimony are not available in a case in equity, for the chancellor is supposed to act only on proper evidence.

There is no question of law involved, only questions of fact, and if the proper evidence justifies the decree the judgment ought to be affirmed, and we think it does.

Decree affirmed.

Zane, C. J., concurs.
H. P. Henderson concurs.
Anderson, A. J., "

Endorsed on back: Title court & cause. Opinion. Filed March 1st, 1890. Jos. P. Bache, clerk.

206 By the Honorable Charles S. Zane, chief justice of Utah.

To the Salt Lake Foundry and Machine Company and to Arthur Brown and E. B. Critchlow, its attorneys, Greeting:

Whereas the Mammoth Mining Company have lately appealed to the Supreme Court of the United States from a judgment and decree reindered in the supreme court of Utah Territory in favor of you, the said Salt Lake Foundry and Machine Company, and have filed the security required by law:

You are, therefore, hereby cited and admonished to be and appear at a Supreme Court of the United States to be held at the city of Washington on the second Monday of October next, to do and receive what may pertain to justice to be done in the premises.

Given under my hand, at the city of Salt Lake, in the Territory of Utah, this 28th day of August, in the year of our Lord one thousand eight hundred and ninety.

C. S. ZANE,
Chief Justice of Utah Territory.

Due service of a copy of the above citation admitted.
ARTHUR BROWN,
Attorneys for Salt Lake Foundry and Machine Company, Defendant in Error.

207 [Endorsed:] Supreme court of Utah. File No., 62. Mammoth Mining Co., appellant, against Salt Lake Foundry and Machine Company, respondent. Original citation. Filed in the

office of the clerk supreme court of Utah and a copy deposited with me this 28th day of August, 1890. Jos. P. Bache, clerk.

208 Know all men by these presents that we, James A. Cunningham and William McIntyre, both of Salt Lake City, Salt Lake county, Utah Territory, are held and firmly bound unto the Salt Lake Foundry and Machine Company and to its successors and assigns in the just and full sum of twelve thousand dollars ($12,000), lawful money of the United States, to be paid to said The Salt Lake Foundry and Machine Company, its successors and assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, successors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 28th day of March, A. D. 1890.

Whereas lately, at a term of the supreme court of the Territory of Utah, in a suit pending in said court between The Salt Lake Foundry and Machine Company, as plaintiff, and The Mammoth Mining Company, as defendant, a final judgment was rendered by the said court on the 1st day of March, A. D. 1890, affirming a judgment of the district court of the first judicial district of Utah Territory in and for Utah county against said defendant and in favor of said plaintiff for the sum of five thousand and eleven and fifty-four hundredths dollars ($5,011.54), including costs taxed at two hundred and eighty-eight and thirty-five hundredths dollars ($288.35), and said defendant having prayed and been allowed an appeal from said final judgment of affirmance and the costs thereof to the Supreme Court of the United States and for a stay of all proceedings thereon pending said appeal:

209 Now, therefore, the condition of this obligation is such that if the said appellant shall prosecute said appeal to effect and answer all damages and costs if it fail to make its plea good and pay or cause to be paid all interests and costs on the appeal and just damages for the delay, together with the amount of said judgment or of any judgment which may be entered against it in case said appeal shall fail to be made good and said judgment be affirmed, in whole or in part, or in case said appeal shall be dismissed, then this obligation to be void; otherwise to be and remain in full force and effect.

(Signed) WM. McINTYRE. [SEAL.]
(Signed) JAMES A. CUNNINGHAM. [SEAL.]

Supreme Court, Utah Territory.

I hereby approve the foregoing bond on appeal to the Supreme Court of the United States and certify the same to be good and sufficient as a supersedeas in said action.

(Signed) C. S. ZANE,
Chief Justice Supreme Court, Utah T'y.

Endorsed on back: "Bond. Mess. James A. Cunningham *et al.* to Salt Lake Foundry and Machine Company."

Marked: Filed Apr. 12th, 1890. Jos. P. Bache, clerk, by F. E. McGurrin, deputy clerk.

210 UNITED STATES OF AMERICA, *Territory of Utah,* } *ss:*

I, Joseph P. Bache, clerk of the supreme court of Utah, in pursuance of an appeal allowed in the case of Salt Lake Foundry and Machine Company, respondent, *vs.* The Mammoth Mining Company *et al.*, appellants, lately pending in said court, do return attached hereto a transcript of the record and proceedings, opinion and bond on appeal, together with the original citation, all in and of said court and cause, to the Supreme Court of the United States; and I do hereby certify that said attached transcript of said record and proceedings, opinion and bond is a full, true, and correct copy of the several originals thereof on file or of record in my office.

Seal Supreme Court, Territory of Utah, United States of America.

In witness whereof I hereunto set my hand and affix the seal of the supreme court of Utah Territory this 28th day of August, A. D. 1890, at Salt Lake City, Utah.

JOSEPH P. BACHE,
Clerk Supreme Court of Utah.

Endorsed on cover: Case No. 14,150. Utah Territory supreme court. No. 181. The Mammoth Mining Company, appellant, *vs.* The Salt Lake Foundry and Machine Company. Filed September 16, 1890.

181

Office Supreme Court U. S.
FILED.
SEP 21 1893
JAMES. H. McKENNEY.
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

THE SALT LAKE FOUNDRY AND MACHINE COMPANY.

APPELLEE,

vs.

THE MAMMOTH MINING COMPANY,

APPELLANT.

BRIEF FOR APPELLANT.

C. W. BENNETT,
J. G. SUTHERLAND,
Counsel for Appellant.

Star Print. Herald Block.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

THE MAMMOTH MINING CO., APPELLANT,

vs.

THE SALT LAKE FOUNDRY AND MACHINE COMPANY.

BRIEF FOR APPELLANT.

In the record of this case there is manifest error. We assign the following errors, and rely upon them for reversal of the judgment:

I.

The court below erred in holding that the defendant below was bound for debts contracted by H. A. M. B. Johnstone, in the absence of evidence that he was defendant's agent, or was held out by defendant to plaintiff or to others with its knowledge, as such agent; and against much evidence that he was not such agent.

II.

The court below erred in affirming the trial court's erroneous admission of evidence, against defendant's objection, of acts of Johnstone and Bowers in using the defendant's corporate name in violation of their agreement with defendant, without showing that plaintiff had any knowledge of such acts at or prior to the contracting of the debt in question.

First. The court erred in admitting in evidence respectively plaintiff's exhibits 2, 3, 4, 5, 6 and 7, and overruling defendant's objections thereto.

Second. The court erred in permitting witness, Stringer, to answer the following question: "Now, I will ask you if the pay roll for the succeeding months January, February, March and April, 1883, were in the same form;" and overruling the defendant's objections thereto.

Third. The court erred in admitting in evidence plaintiff's exhibits 9 and 10 respectively, and in overruling defendant's objections thereto.

Fourth. The court erred in admitting severally plaintiff's exhibits 13, 15, 16, 17 and 18, and in overruling defendant's objection thereto.

Fifth. The court erred in permitting witness Stringer to answer the following question: "Do you know of anybody else running these works except the Mammoth Mining Company, and if so, who?" and overruling defendant's objections thereto.

Sixth. The court erred in admitting in evidence copy of Salt Lake *Tribune* containing notice referring to claims against the Mammoth Mining Company, and signed H. A. Monroe Butler Johnstone, and in overruling defendant's objections thereto.

I. The defense in the court below was that the defendant was a stranger to the contract for and the delivery and receipt of the supplies mentioned in the complaint.

We prosecute this appeal and allege the errors aforesaid on the basis of this defense. The record contains all the evidence given upon the trial, and the actual relations existing between Johnstone and the defendant are shown by documentary proof. The principal error of the Territorial courts consisted in ignoring

the operation of the written contracts of January 7th, and November 1st, 1882. The former commencing in the record on page 141 and the latter on page 146. By the former, J. A. Cunningham, Samuel and William McIntyre and P. T. Van Zile, owning 392,000 of the 400,000 shares constituting the capital stock of the defendant corporation, contracted to sell them to W. H. H. Bowers. By the latter contract the same vendors except Van Zile contracted with said Bowers to sell 341,806 shares of that capital stock.

It will be noticed that by this contract Bowers agreed to pay $631,502.50 for that stock. Of this sum $35,000 was paid down and the remainder was payable in installments at short intervals in the future. At the time of each payment a corresponding amount of stock was to be delivered.

This agreement of November 1st, 1882, contained these provisions:

"The second party agrees that he will so soon as practicable, and within one hundred and fifty days from the execution and delivery of this agreement, at his own expense, furnish all the material for and erect and construct and put in good working order on the mill site of said mining company, six smelting furnaces in addition to those now on the property; each furnace to be of the size and capacity of those now on the property; also refining works and machinery, for the purpose of and suitable for separating and refining the metals in the bullion and matte made by the furnaces at said mine, and of sufficient capacity to separate and refine all metals in the bullion and matte made from ores from said mine by the furnaces now on the property and those which the second party shall erect as aforesaid."

Record p. 148.

"The party of the second part is authorized to take immediate possession of the mining and reduction properties of the Mammoth Mining Company, situated in the Tintic Mining District, Juab County, Utah Territory, consisting of the Mammoth Mining mine, mill site, furnaces, buildings, fixtures, and all tools, implements, property and appurtenances belonging to said company and appurtenant to or used with its mining properties, and from henceforth until some default shall be made on his part,

and until the time limited for the full performance of this agreement if no default be made, to retain the possession of such properties, and in his own name and behalf, and at his own expense, to work, manage and operate and improve said properties in a good miner-like manner, and to receive the proceeds of such workings so long as he shall fully comply with the terms of this agreement."

Record p. 147.

The contract concludes with this clause:

"It is mutually understood and agreed that, while the party of the second part is in possession of the mining and reduction properties, under this agreement, the entire business shall not only be conducted by him in his own name and behalf, but that all contracts shall be made, all materials bought and shipped, all pay rolls, time checks, receipts, accounts and vouchers made and kept in name of, and upon the sole credit of the party of the second part."

Record p. 150.

As the vendee thus obtained possession of the company's properties and a right to work their mines by this contract and with the assent of the company, (see Record p. 79) he was required to deposit with Edward Austin the gross proceeds, but had a right to receive upon audit an amount equal to the expenses of mining and reducing the ores and marketing the product. The net proceeds belonging to the contracted stock was to be paid to the vendors on the contract for the stock and the remainder held for other stockholders.

These are the salient points of the contracts. Bowers was in possession under the preceding contract and he continued in possession under the later one.

He assigned a part of the benefit of the contract to Johnstone, a supposed English capitalist, who also appears to have represented other English capitalists, and they obtained from him and Bowers some of the company's stock which was the subject of that contract. After the assignment to Johnstone he took part in the management of affairs at the mines, and in carrying on work to make the improvements required by the contract. They proceeded in the performance of Bowers' part of the con-

tract until about June, 1883, when they failed, abandoned the works and the contract; then the company resumed possession.

The plaintiff below sued for goods ordered by Johnstone, between January and April, 1883. The plaintiff was a corporation doing such business at Salt Lake, as its name implies. Elias Morris was its president, but taking no practical part in its business; (Record p. 55) this was managed by Thomas Pierpont its superintendent. The goods so supplied were charged to the defendant, apparently because Morris introduced Johnstone to the superintendent as the defendant's manager.

Record p. 43.

The situation of the parties to those contracts with reference to the company's property, in January, 1883, is part of the state of the case of which this court may take cognizance. It seems to be necessary to a due consideration of the errors assigned.

The plaintiff below introduced evidence by wholesale of the modes and forms of business adopted by Bowers in 1882 and Johnstone and Bowers in 1883, as though to establish their actual agency for the defendant below. It thus appears that in general they conducted business in their own names; their use of the company's name was exceptional, and mostly in non-contractual parts. If we are warranted, as obviously we are, in assuming that the record shows that in January, 1883, Johnstone was conducting operations upon the company's property for himself and Bowers without any authority whatever to bind the Mammoth Mining Company by any contract whatever, no third person could avail himself of any such contract made by Johnstone except on the principle of estoppel.

2 Herm. on Estop., §1078-1079.
Bigelow on Estop., 470.
White vs. Morgan, 42 Iowa, 113.

One who trusts another as agent on his own declaration does so at his peril. The defendant below as principal is not bound by the act of Johnstone, unless it has by its own conduct before the plaintiff below, or of which the plaintiff had notice giving him apparent authority, so that a denial of it after it had been reasonably acted upon would operate as a fraud.

Johnstone's statements or acts are of no consequence unless they are made to or done to the knowledge of the person solicited to deal with him, nor then unless the supposed principal "stands by"—knows of his declarations or acts—and keeps silent or acquiesces in them.

The defendant below was not present when Johnstone opened the account in question with the plaintiff below in January, 1883. The defendant did not stand by and hear Johnstone assert that he was agent; therefore, the defendant owed no duty to the plaintiff below to contradict that statement. It would be absurd to charge the defendant with the duty to contradict a statement of which it had no knowledge. So it could not be held that the plaintiff below acted upon other false and specious appearances of Johnstone having authority of which the plaintiff had no knowledge.

There is no evidence whatever that the plaintiff knew of a single instance of Bowers or Johnstone making contracts or doing any business in the defendant's name prior to or during the period of the dealing which made the debt in question.

The Territorial Courts erred in respect to the crucial fact to be established after the actual relation of Johnstone and Bowers to the properties on which their operations were conducted appeared. They stood in no relation whatever to the Mammoth Mining Company except having its license to occupy its properties for the purpose of fulfilling their contracts with individual stockholders for the purchase of stock. The evidence objected to was admitted, and according to the opinion of the court found in the record, considered, not with those contracts, but as though they did not exist, to determine if Johnstone and Bowers were not acting in such manner on the company's property, and with such knowledge of its officers as would warrant the inference as matter of fact that they were really agencies employed by the company to do its mining and erect for itself additional works. This was clearly error. That question was precluded by the pendency of those contracts and the resolution of the company giving possession.

The only question on any solution of which the plaintiff could hold the company bound for the debt contracted by Johnstone, was whether in the absence of actual agency the de-

fendant below had so conducted by acts done or by omissions within the knowledge of the plaintiff, as would on the principles of estoppel bind the defendant to answer as principal for Johnstone's acts.

The acts of Johnstone and Bowers not shown to have come to the notice of the plaintiff below, would be irrelevant and immaterial; they did not deceive or mislead. So all such acts of which the defendant below had no notice, whether known to the plaintiff below or not, would be without significance. The defendant below did not acquiesce in anything of which it was ignorant, nor could representation or concealment by the defendant below be predicated of any such acts.

The case received no consideration in this aspect by the Territorial courts.

II. There was error in the admission of testimony excepted to. Attention is now invited specially to that testimony:

1. In admitting exhibits 2–7. The first, exhibit 2, "Rules of Mammoth Company," record page 135. This document does not purport to be made by the defendant. "Mammoth" was the name of the mine. See contract, record page 147. Any association working it would naturally use that name. The Mammoth Company is not the defendant.

Exhibit 3, as a separate thing has no heading. It was probably a continuation of the code of which exhibit 2 was the beginning and exhibit 8 the conclusion.

Exhibit 4 was a pay roll; heading "Work on water ditch, Mammoth Mill job." This item has no tendency to show that the defendant was employer.

Exhibits 5, 6 and 7 were pay rolls with defendant's name in the heading. They were objected to for not being the pay rolls used during the period in question. They were of certain months in 1882. They were not shown to have been brought to the notice of the plaintiff before or during the dealing in question, nor to the notice of the defendant.

2. The second exception is to the ruling admitting secondary evidence of the form of pay rolls for the period in question—January, February, March and April, 1883. Record page 15. There was no proof of the loss of the originals. These

belonged to Bowers and Johnstone, and they were not called on for them.

If these objections were deemed properly overruled, still the evidence was immaterial, for these Rolls were not then known to either of these parties.

3. Exhibits 9 and 10 are the letters marked "Exhibit 10" —heading Mammoth Smelting Works.

4. Exception to admissions of Exhibits 13, 15, 16, 17 and 18. Not one of these purports to emanate from the defendant.

5. Exception to the question, "Do you know of anybody else running these works except the Mammoth Mining Company, and if so, who?" Record page 23. This question assumes that the defendant run the works.

6. The exception to admitting a notice in the Salt Lake *Tribune* over the signature of H. A. Monroe Butler Johnstone. It was hearsay and incompetent. There was no evidence that either of these parties saw it.

The foregoing items of testimony may be taken as a sample of the whole testimony introduced by the plaintiff below; of the testimony upon which the decree was made. There is an entire want of testimony tending to show that the contract of November 1st, 1882, commencing on page 146 of the Record, had been abandoned, or that Bowers or others claiming under him were in possession as agents of the defendant in derogation of that contract. There is also an entire want of evidence that their modes and forms of business were known to the plaintiff before or during the dealing in question, or to the defendant.

The Supreme Court of Utah say in this case: "The errors assigned in reference to the admission of testimony are not available in a case in equity, for the chancellor is supposed to act only on proper evidence." This cannot be true if there is no proper evidence in the record, and the decree rendered requires evidence. There is evidence in this record that Johnstone and Bowers were operating on their own account; there is none that the defendant held them or either of them out to the public in general or to the plaintiff in particular as its agent.

It not difficult from this record to ascertain why the Foundry company plaintiff below charged the account in question to the Mammoth Mining Company. It was solely because Elias Morris

the president of the Foundry company introduced Mr. Johnstone to Mr. Pierpont, superintendent of the foundry company, as manager of the Mammoth Mining Company when he first applied for work and opened the account in question. The deal continued without question from that time to the end, and on the confidence imparted by that introduction. It will be seen, too, in this record, that the Mammoth Mining Company were in no way responsible for that introduction. Morris had served Bowers and Johnstone during the same period and for a month or more before, and charged nothing done or furnished by him to the Mammoth Company, but solely first to Cunningham and Austin as trustees. and afterwards to Bowers and Johnstone. There is no contradiction on these points, and the testimony may be read as showing the actual situation. Below is the whole of Mr. Morris' testimony with the exhibits belonging thereto, as well as some other testimony showing his knowledge of the contract for the sale of stock, of November 1st, 1882. under which Bowers and Johnstone were in possession:

ELIAS MORRIS, sworn for plaintiff:

Q. Mr. Morris, where do you reside?

A. Salt Lake City.

Q. What is your business?

A. Contractor.

Q. Did you at any time have anything to do with the works at the Mammoth construction?

A. Yes, sir.

Q. When did you have anything to do with it?

A. In November, 1882. Up to March, I think

Q. From November, 1882, until March, 1883?

A. Yes, sir.

Q. What were you doing?

A. Building furnaces at the smelter.

Q. Who asked you to go there to work and build these furnaces?

A. Mr. Cunningham called upon me first.

Q. J. A. Cunningham?

A. Yes, sir.

Q. When was this, that you made the arrangement?

A. I think, in the beginning of November.

Q. He employed you to go to work?

A. Yes, sir.

Q. How long was this before Butler Johnstone appeared upon the scene?

A. Six weeks or a month.

Q. When he came who introduced you to him—Butler Johnstone?

A. First he was introduced in the Mammoth Mining Company's——

Q. In the office?

A. Yes, sir.

Q. Where was their office?

A. No. 101 Main Street, I think.

Q. Who was there at that time?

A. There was Mr. Cunningham, and I think one of the McIntyres.

Q. Anything said as to what he was going to do?

A. No, sir.

Q. Didn't you receive directions from Cunningham to truckle to Johnstone and take orders from him?

A. Yes, sir.

Q. Who gave them?

A. Cunningham.

Q. What time, with reference to Butler Johnstone's advent?

A. I think about the 10th of December, 1882.

Q. Before or after Johnstone's arrival?

A. After he arrived?

Q. What did Cunningham say on the subject?

A. I had been doing the work under Cunningham; he said he had concluded to turn the management of the affairs to Johnstone, and from that time I would receive my orders from him and do the business through him.

Q. In connection with your employment did you have occasion to order material for the company?

A. Sometimes I did.

Q. Sometimes for the company and sometimes yourself. They furnished the materials?

A. Yes, sir; they would ask me when I came down to go to

the foundry—would look at my convenience—and go and order them.

Q. Did you order things for the construction of this building from the plaintiff?

A. Yes, sir.

Q. What things did you order?

A. Binding rods for the stacks in the furnaces.

Q. General stock in the construction of the furnaces.

A. Yes, sir.

Q. Did you in the course of your investigation, notice Mr. Johnstone down in the foundry?

A. Yes, sir.

Q. Did you have any connection with the foundry at that time?

A. Yes; I was president at that time.

Q. How did you introduce him to the superintendent?

A. As manager of the Mammoth Mining Company.

Court:

Was this after the conversation with Cunningham?

A. Oh, after sir

CROSS-EXAMINATION.

By Mr. Bennett:

When did you say you commenced doing work at the defendants' works?

A. I suppose in the beginning of November.

Q. Who employed you?

A. Mr. Cunningham.

Q. As trustee?

A. He said he was trustee.

Q. Did he say for whom and what?

A. No, sir.

Q. Did you hear for whom he was trustee?

A. I can't hear.

Q. What did you hear?

A. He called upon me for an estimation for these furnaces. He would like to have me put up those furnaces, and would like to get an estimation from me. I told him I would give him an estimation. Told me I better go down to the London bank to

see Mr. Austin; he said I would like to have you do that, Mr. Morris, if you can give a figure satisfactory. Then I asked him about the pay; he says, We wont go on with the work any farther than what we get the money to go on with. They were expecting money from England from the sale of stock. I went to make an estimate. Mr. Cunningham called again; I gave him the figures; he said I was a little too high, he would like for me to do that work if I could drop down a trifle; would like me for it. I did so and agreed upon that to go and make a start.

Q. You understood that Mr. Cunningham and Mr. Austin were contracting as trustees in the hope of money coming from England? You understood that, didn't you?

A. Mr. Austin said he was acting as trustee, and further said that as he was engaged in a bank account—would like to employ Mr. Cunningham to see to it.

Q. Was there a time that Mr. Cunningham was acting as trustee, you furnished goods upon his order as trustee, and received checks signed as trustee?

A. Yes, sir; I will say that these were furnished by Cunningham as president, and checks were drawn in payment of the bills as trustee.

BENNETT: One bill is November, 1882, and one November, 1882. One check in November 17th, 1882.

Q. These was bills made by you, and checks made to you, and money received on the checks?

A. I would like to make this statement: I had been furnishing the Mammoth Mining Company for materials for months before this to the Mammoth Mining Company by the orders of W. H. H. Bowers, manager of the Mammoth Mining Company, and when Mr. Cunningham came there and set down this contract he gave instructions that we was to keep the accounts in his name.

Q. After this conversation you had when Mr Austin said that the money was coming from England?

A. Yes, sir.

(Marked Exhibits "39" and "40.")

Shipping bills.

(Marked Exhibit "41.")

By Mr. Bennett:

Q. How long a time did you furnish materials to Austin and Cunningham, trustees?

A. Maybe something in the neighborhood of a month, or so, I think.

Q. State whether or not at the end of the time that you ceased furnishing to them as trustees there was a balance from the trustees to you?

A. Well, they hadn't paid up what they ordered.

Q. After they had ceased ordering what was done with the account?

A. Carried right on.

Q. In whose name?

A. I think in the same way.

Q. Is it not true that the bills were O K'd by Mr. Cunningham, and all went to Mr. Johnstone?

A. When I suggested to him, and wanted to settle up his account before starting a new one he could not settle.

(Bill account of trustees marked Exhibit "42")

Witness:

I think that is the account of what they received in that month.

Q. Did Mr. Cunningham as trustee O K the balance of the bill had against the trustees?

A. I think he did; and it went to Johnstone's account.

Q. You know Butler Johnstone?

A. I don't know whether I do or not. Know very little, I wish I had known less. I met him.

Q. When did you meet him?

A. In the office of the company.

Q. Who was there?

A. Mr. Cunningham. I think Mr. McIntyre—one of them.

Q. It was in the office?

A. I think that is where I found them, right in the office.

Q. Was Bowers there?

A. I don't know. I was introduced to him as a gentleman from England, and that is all that happened that night.

Q. Did Mr. Cunningham state to you in what capacity Mr. Johnstone came from England; for what purpose?

A. No, sir; they did not.

Q. Did you have a conversation with Mr. Austin about the time Johnstone arrived; about who he was and who he represented?

A. Some time after that.

Q. About when?

A. So far as who he was, I don't remember anything in regard to that.

Q. Do you remember the transaction you had with Johnstone in regard to any loan of $5,000.

A. Yes, sir.

Q. When did that occur?

A. I think the 23d or '4th of December.

Q. When did Johnstone arrive here?

A. To the best of my recollection on December 7th or 8th.

Q. Call your attention to a check for $5,000 for the purpose of a loan of $5,000 to Butler Johnstone?

A. Yes, sir.

Q. At or about the time you drew the check and loaned the $5,000—state whether you took a note, or whether a note was given you, handed to you for the $5,000, signed by A. Monroe Butler Johnstone?

A. Mr. Austin brought the note written up by himself and signed by Mr. Johnstone; said that Johnstone had gone to Tintic and he spoke to me or me to him—when I saw that note I said, I didn't loan that money. I objected to that note and threw it on the table. My check was all I will have go into the bank. I had a little conversation then with Austin—I asked him a few questions then in regard to this money. I supposed I was working for the Mammoth Company, and they had some kind of a scheme to dispose of their stock and from the proceeds to increase the capacity of their works, and Mr. Austin told me that there was men—a number of Englishmen—lords, dukes and the devil—buying their stock and large sums of money coming; that there was a large block of men right there. And Cunningham told me the same things over. Butler Johnstone had been a member of Parliament and lord—

Q. Didn't you understand that Butler Johnstone had been sent out by the English lords and dukes—

A. I don't understand it.

Q. Didn't you understand that there was coming from these people—

Court:

That money was to be derived from the sale of stock of the Mammoth Mining Company?

A. Yes, sir.

Q. You got that from Cunningham and Austin?

A. Yes, sir; that they were disposing of Mammoth stock, and the proceeds of that stock was coming here to increase the capacity of the work of the company.

Bennett:

Q. Did you have a conversation with Butler Johnstone the day before you gave him this check?

A. I did.

Q. State what he said to you in regard to the moneys coming from England?

A. He wanted me to build him a brick kiln. I took him down to the brick yard and showed him; and down there he got to talking about the works—asking a great deal. He said, "If I could see over eight or ten days, then we can swim with ease without any trouble whatever in rushing on the works." Says I, "Mr. Johnstone this way; that we don't have money to pay for the materials that was loaned on that work—if I know that to be true and correct, I don't know but what I would loan that money to get over this embarrassment—that $5,000 for a few days. That is all the conversation." He says, "If you do you will grant us a great favor." I expected him over—he sent Austin; he went off.

Q. Did he in that conversation say to you that the money he expected to get was money to come from England?

A. Yes, sir; that is what I understood, the money was coming from.

(Check marked Exhibit "43.")

Q. I will read an answer which I understnad you made on the trial of the case of the Mammoth Mining Company, being the second trial of the case; I ask you if you did not testify in that trial in the language I now read to you, relative to money from England. Question. You may state the transaction with

reference to loaning money, with whom you dealt directly, and the whole detail—when and where it occurred, and with whom and so on?

Answer. On the 23d of December, if my memory serves me, 1882, Mr. Johnstone wished to go down to my brick yard to see my kiln, that he intended to build one like it; on the way going he mentioned to me that if he could see nine or ten days over, they could swim with ease; I asked him what he meant and he said from stock sold in England—London, there was $240,000 on the way; he expected to start if it wasn't on the way, and would free them from all encumbrances; at this time they were so short of means that they could not get their materials unloaded from the cars, as they had no means to pay for the freightage; the track was full of cars of fire-brick and fire-clay, and iron, that we needed for the furnaces. At this time I had some fifty or sixty men of my own under contract, and I was liable for their board, and loss of time, and I couldn't get away till I completed my contract. I told him then, I says, "If you are positive that this money you mentioned will be here within that time, I think that I can find a way that I could raise as much as $5,000 that will help to free the freight, and enable us to go on with our work." He said it would be a great favor, and that ended it. I said further, says I, "I don't loan this for the sake of interest—it is an accommodation, to forward on the work, and nothing else;" nothing else was said that day and I expected he would call on me some other time, but instead of coming himself he sent Mr. Austin the manager of the London bank, who called at my place a little before 10 o'clock the next morning, and said that he had a conversation with Mr. Johnstone, or Mr. Johnstone with him, and I kindly offered the use of $5,000 to help them in the paying of those debts and freights. I said "Yes, I had a talk with him, but I expected to see him himself." "Well," says he, "he was in a hurry to go down to Tintic, so he took the train that morning, and left a little scrap of paper, just two lines, as a note for value received." I said to Mr. Austin, says I, "I didn't expect a note drawing interest; I just accommodated them for a few days to help them out of their embarrassment until this money they were expecting should come." He said, "That was very kind of you." "Now, says I, "Mr. Austin, I would like to

have a word with you." Says I, "This money that they expect from England, and those gentlemen that has been mentioned to me by several parties interested there," says I, "I suppose you know something about it." He said, "Yes." Says I, "Can you explain something about these moneys coming for stock?" and he mentioned five or six names, lords and members of Parliament, and I don't know who, and that they were millionaires and reliable. I says, "How is it, if they are reliable, that you, as manager of this bank, cannot loan them this amount of money; you are a member and a director." He said, "I have allowed so far as the law allows me; it is enough for my situation if I allow any more. I dare not allow any more than so much." Says I, "Upon this I will let you have it." I wrote him a check, which was to go direct toward those debts and freights.

Q. Did you so testify on that trial?

A. Yes, sir. Just the same I do to-day. The amount of money was named.

Q. Mr. Morris, what relation did you bear to the Salt Lake Foundry Company during the month in 1882, and January, February and March in 1883?

A. President of the company.

Q. After Mr. Johnstone arrived here on the 10th of November, did you do business with him by the way of doing work under his orders?

A. The orders and the labor continued right along without a change in anything until we finished.

Q. Except you charged the items to Butler Johnstone after the trustees went?

A. I said that Cunningham gave me instructions to charge to Johnstone from that time on, so keep his account separate so that he could straighten out his.

Q. During all the time that Cunningham and Austin acted trustees had you had transaction with W. H. H. Bowers?

A. Yes, sir.

Q. How long a period of time?

A. During 1882.

Q. Did you, at any time in March, 1883, furnish items on account to either of them, Mr. Bowers or Mr. Johnstone, for supplies and materials furnished?

A. I don't know when that was given there; that is, I don't think.

Q. I will ask you to look at this item, and see if this is account rendered by you to Messrs. Butler Johnstone and Bowers?

A. Yes, sir.

Q. This is an item of account, W H. H. Bowers and Butler Johnstone to Elias Morris. That covers Bowers, Cunningham, Johnstone and the whole of them?

A. Bowers' account was presented——

(Marked Exhibit "44.")

Offered in evidence.

Q. I have one more question: The note you took from Butler Johnstone you carried it in the bills receivable?

A. Really, I cannot tell; I am no book-keeper.

Q. Did you not so testify on the second trial of your own suit in Salt Lake City?

A. I don't remember.

Q. Didn't you testify in substance that it was carried to the bills receivable on your account?

A. I don't know that I did. I can't swear to that.

Court:

That what was carried?

Counsel:

The note was carried to bills receivable in his book.

RE-EXAMINED.

By Mr. Brown:

Q. Did Mr. Butler Johnstone say why he wanted this account a new account. Did he say why you was to charge to this account?

A. Yes, sir.

Q. What did he say?

A. There was one account to Bowers, running from 1883——?

A. He says, You can slide them into one of those that has a place on the book; it is the same thing from beginning to end.

Q. You was asked about this $5,000 note transaction—same date as your check?

A. 23d of December.

Q. Was this before or after you had introduced Johnstone to the foundry company?

A. Oh, this was after.

Q. After you had introduced him? What became of that $5,000 note?

A. I turned it over to them when we compromised.

Q. At that time did you turn over any papers to them?

A. Yes.

Q. Do you remember what papers?

A. All the shipping papers, various papers, pay rolls, and everything I had.

Q. Do you remember whether the reports of the assay was?

A. All.

Q. Where was that transfer made?

A. At your office.

—. ——?

A. Mr. Cunningham.

Q. State whether there was a large amount of documents?

A. About a wagon load.

Q. Books of the company?

A. Yes, sir.

Q. What sized forms were those?

A. Quite a large ledger and cash book.

Q. How many of them?

A. Mining cash book—Mammoth Mining Company—day book, and I think a journal.

Q. Did you see these books of the Mammoth Mining Company?

A. Yes, sir.

Q. In whose name were they kept.

A. Mammoth Mining Company.

Q. What dates were on them?

A. From 1882 to 1883—part of 1883.

Q. What office did Butler Johnstone occupy in Salt Lake City?

A. Mammoth Mining Company's No. 101.

Q. What office did Bowers occupy?

A. Same one.

CROSS-EXAMINED:

By Mr. Bennett:

Q. Mr. Morris, where were those papers, books—wagon load—delivered to Mr. Cunningham?

A. At Mr. Brown's office.

Q. Do you mean the Bowers' books?

A. Yes, sir.

Q. You said the company's books?

A. Company's books were all headed the Mammoth Mining Company.

ELIAS MORRIS, re-called:

Q. You may state what you know in regard to that promissory note?

A. Mr. Pierpont had been to Johnstone to get some money on account. When Mr. Johnstone called in my office to pay some item, he had promised Mr. Pierpont to leave that check to give to me.

Q. That one thousand and forty-two dollars?

A. Yes, sir; the note I am talking about. The check is for $500. He left this at my office to give to Pierpont, and then Pierpont called, he took it and looked at it, he didn't think it was right, to accept a check on the bank there and then; he cashed it at the bank to see if they would accept it. They said "No." Brought it back, and it lay in my office for some time.

Q. Why didn't you give it to Butler Johnstone?

A. He had left.

Q. That was the day of his departure?

A. Yes, sir.

Q. Didn't see him again?

A. No, sir.

Q. Afterwards did you do anything towards offering it to those other gentlemen?

A. No, sir; I have nothing to do with the foundry.

Q. You didn't do business with the foundry individually?

A. No, sir.

Q. Although president, do not take any individual part?

A. No, sir.

Q. You say that remained in your office for some time?

A. It remained there, expecting to give to Johnstone when he came.

Bennett:

Q. It is dated the 1st of February, I see. Did you notice the date?

A. Only the day Mr. Johnstone left.

Q. You noticed the date, did you not?

A. I don't really remember.

Q. Did he leave before the first of March?

A. I cannot recollect when—what time in February he left.

Q. I understand you to say he left very soon?

A. I understand that he left very soon after that time; I don't recall exactly the dates.

Q. I meant to ask you this evening, how long did you know Mr. Cunningham at the time of these transactions?

A. How long?

Q. Yes, sir.

A. I know him since he was a boy.

Q. How long had you known the Mammoth Mining Company?

A. I have known it by the name of the Mammoth Mining Company ever since it commenced in business.

Q. Did you ever do business with them before Bowers became connected with the company?

A. Yes, sir.

Q. How long a time?

A. Three or four years.

Q. How long had you known the McIntyre boys?

A. Three or four years.

Q. You know that Bowers came from England?

A. Yes, sir.

Q. Did you ask Mr. Cunningham or the McIntyres, what connection Johnstone had with the business?

A. I relied upon Cunningham.

Q. Did you ever ask Cunningham?

A. Yes, sir; I think however, he had been there a little while—I questioned him about it—the money was forthcoming that we expected, and Cunningham told me that he thought Mr. Johnstone honest about the stock—was a millionaire and per-

fectly safe; had no doubt in his mind whatever. I have talked more as confidential man and neighbor. Relied upon him.

Q. You never asked the McIntyres?

A. No, sir; I never talked with them much.

Court:

When was it you had that conversation with Mr. Cunningham you have just related?

A. Must have been somewhere in January. January, 1883.

Q. In that conversation was there anything said with reference to the relation that Johnstone bore to the company?

A. No more than that they were in some kind of a scheme to dispose of the stock.

Q. Was there anything said by Mr. Cunningham in that conversation, which indicated to you the relation that Mr. Johnstone bore to the Mammoth Mining Company?

A. No; never explained.

Q. Nor the interest he had in it?

A. No, sir.

(Exhibit 39.)

Voucher, Austin and Cunningham, trustees, Dr. to Elias Morris, Nov. 17, 1882, $1,144 80, and check on London bank for same amount, signed J. A. Cunningham, trustee.

Record p. 140.

(Exhibit 40.)

Same as Exhibit 34 (Record p. 140) differing only in amount. Nov. 13, 1882

Record p. 141.

(Exhibit 41.)

Package—Utah Central railway shipping bills; marks and destination, J. A. Cunningham, trustee, consignor, E. Morris.

Record p. 141.

(Exhibit 42.)

Vouchers—Austin and Cunningham, trustees, Dr. to Elias Morris, December 6th, 1882.

Record p. 141.

(Exhibit 43.)

Elias Morris, check on Deseret National bank, December 23, 1882, to order of London bank for $5,000.

Record p. 141.

(Exhibit 44.)

Account—Messrs W. H. H. Bowers and Butler Johnstone, Dr. to Elias Morris, from January 31st 1883, to March 27th, 1883, $15,671.80.

Record p. 141.

MR. CUNNINGHAM, re-called: (Extract. Record 57.)

Q. You are one of the parties to the contracts that I read from; the J. A. Cunningham, representing certain stock of that company, who entered into the contract with Bowers on the 7th day of January, 1882?

A. Yes, sir.

Q. After the contract of January 7, 1882, was executed, what, if anything, was done with reference to the ground, and Mr. Bowers' connection with it under that contract?

A. I think there was a resolution of the board.

Q. Did he go into possession, or was he put into possession?

A. Yes, sir.

Q. State whether or not Mr. Bowers superintended the work about the smelters, and worked the mine, in pursuance of the contract?

A. Yes, sir.

Q. State what you did?

A. He commenced a few days after the contract was entered into; went down and took possession of the property; commenced making preparations for the construction of furnaces, as was required by the contract. Continued there along until he got them finished. I think finished about the first of April, and commenced smelting. Continued right along working the property; the proceeds were deposited in the London bank under terms of the contract, and things moved along in a quiet kind of a way until in May sometime, when he was likely to fail about making the May payment. Then he asked for a modification, said that he could raise some money under certain conditions;

wanted us to release some stock. We agreed to do so and did release some. Later on, in August, he then made another complaint, that it was a difficult matter to get money from his friends in London. He asked a further modification, and we also consented to that, and he made a payment sometime in August, and we released some more stock to him. He had got considerably involved, and Mr. Austin was in communication with the parties in London, as manager of the London Bank of Utah, and said that he had cables from London, that the parties there would advance money to construct furnaces on the condition that that money should be used with that express purpose. Asked that Mr. Austin take the management to dispose of that sum of money for these new furnaces.

Q. Was that before or after the execution of the contract of December 2d and November 1st?

A. Before the contract was executed for November 1st.

Q. You say you had this talk with Mr. Bowers and Mr. Austin about raising money to move, before that contract was executed?

A. Yes, sir; Mr. Austin then showed me a cablegram; what purported to be a cablegram; stating that they would advance one thousand pounds a week towards the construction of those furnaces. Asked me to take the management of the affair.

Q. When, after that time, 1st of November, 1882, did you have any conversation with Mr. Morris about Mr. Bowers and Johnstone or both, with regard to the works at Tintic?

A. Conversation with him once in the London bank.

Q. About when was that?

A. My impression is that it was in the forepart of January. I went into the bank to draw a check for some money, and saw Mr. Morris standing up by the counter. Mr. Austin had the contract of November 1st, right across the counter; pointed out some parts of the contract and read it to Mr. Morris.

Q. When did you see these pay rolls headed Mammoth Mining Company?

A. I think it was—pay rolls and vouchers—some time about the first of April, 1882.

Q. 1882?

A. Yes, sir; Mr. Samuel McIntyre called my attention to it,

about the same time that we consulted with our attorney, and he gave some explanation why he had done so. We forbid him using the name of the company in any shape or form; he said that would do so no more.

J. FRED CORKER, re-called for defendant. (Extract. Record p. 79.)

By Mr. Bennett:

Q. You have in your hand the minute book of the Mammoth Mining Company. Turn to the report in regard to the transfer of the property. Please exhibit it to the court and read it?

Q. I ask you to refer to the motion of the board of directors touching the transfer of the property?

A. "Salt Lake City, Utah, January 1st, 1882. Meeting of the board of directors was held at the office of W. H. H. Bowers, 101 Main Street, 4 o'clock p. m. on the above date. President James A. Cunningham, Samuel McIntyre and Philip T. Van Zile, secretary, appearing to be present. Resolution that the Mammoth Mining Company having consented to the carrying out of a certain contract by and between James A. Cuuningham, Samuel McIntyre and William McIntyre, that we authorize the transfer of the property, pursuant to the said contract. Resolution carried."

* * * * * * *

Q. Do you know Mr. Morris—Mr. Elias Morris?

A. I do.

Q. State whether throughout 1882 he, Mr. Elias Morris, had any business with Mr. Bowers to your knowledge?

A. He had in 1882 and 1881. I told Mr. Morris to go down to Mr. Bowers' office and see him in regard to this matter. Went down to Mr. Bowers' office, and Mr. Bowers and Mr. Morris talked about filling this order.

Q. Give what they said, if you can?

A. They talked over this matter, and Mr. Bowers explained it to him in regard to this contract with the company, and dur-

ing the course of the conversation took the contract out of the safe.

Court:

When was that?

A. In the early part of 1882, first order that we took to Mr. Morris to supply the works.

Q. State the month?

A. February or March.

Q. You said that Mr. Bowers exhibited to Mr. Morris the contract at that time. State more particularly about that. State whether you saw the contract or contracts?

A. I did. It was the contract—a copy of the original contract.

Q. Copy made by whom?

A. Copy made by myself.

EDWARD AUSTIN, being duly sworn, testified as follows: (Extract. Record p. 99.)

Q. You may state generally what constructions, and what your business was in that regard with Mr. Morris?

A. Well, there had been certain amounts remitted from London for the construction of furnaces, and I was asked to see to the expenditure of this money; I told them that I couldn't do that unless Mr. Cunningham, who was connected with the company would attend to it for me, and as I had every confidence in Mr. Cunningham; if he agreed to do so I would take charge of the expenditure of the money.

Q. State right there from whom the money came, if you know?

A. The money came, so far as I know, from a Mr. Walker —J. M. Walker, that was the name; J. Montgomery Walker was the name of the gentleman whom I drew the drafts on for the money.

Q. Money transmitted from London to the London Bank of Utah for expenditure in these works that you speak of?

A. Yes, sir.

Q. Now, you may state as briefly as you can, the connection of Mr. Morris with the work which you was authorized to

do with this money. I speak now of the initial transactions between you and Mr. Morris?

A. Well, either Mr. Cunningham or I asked Mr. Morris to make a bid on this work; we got several bids; Mr. Morris' bid was a little higher than we had from some others, I forget whom; but as Mr. Morris was a well known man, and a responsible man, I suggested that if he would make a little reduction that we would prefer giving the contract to him.

* * * * * * *

Q. What, if any, information other than you have stated did you communicate to Mr. Morris in regard to the party or parties doing the work and responsible for the work at that time or subsequently?

A. Well, some time later, when Mr. Butler Johnstone came here, I had occasion to see Mr. Morris, and at that time he asked me a good deal about this Butler Johnstone; I told him that I had learned from London about him; I told him he was a man of good family, very well connected, and was left a great deal of money by his father, and I think had been an English member of Parliament, I told him for Canterbury, for some years.

Johnstone was introduced to Morris at the office of the Mammoth Mining Company. It was a simple introduction. Mr. Morris says it took place at that office; he refers to it as though it were significant, as showing that Johnstone was thus vouched for as a representative of the company. Morris knew from conversations with Austin and Cunningham and inspection of the contract of November 1st, 1882, in what interest the operations at the mine in December, 1882, and the early part of 1883, were conducted. From his testimony it is plain that Morris made an egregious blunder when he introduced Johnstone to the plaintiff below. In making this introduction he acted contrary to his knowledge and contrary to his own mode of dealing with the

same management. Since the Mammoth Mining Company did not contribute to that mistake and did not otherwise hold Bowers or Johnstone out as its agent, nor knowingly or even negligently acquiesce in any of their assumptions to act as its agents, to the knowledge of the plaintiff, the findings and judgment are obviously erroneous.

C. W. BENNETT,
J. G. SUTHERLAND,
Counsel for Appellant.

Office Supreme Court U. S.
FILED.
DEC 16 1893
JAMES H. McKENNEY,
CLERK.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

Term No. 181.

THE MAMMOTH MINING COMPANY, APPELLANT,

vs.

THE SALT LAKE FOUNDRY & MACHINE COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

BRIEF.

BROWN & HENDERSON,
Attorneys for Respondents.

IN THE SUPREME COURT OF THE UNITED STATES.

THE MAMMOTH MINING COMPANY,

APPELLANT,

vs.

THE SALT LAKE FOUNDRY & MACHINE COMPANY,

RESPONDENT.

STATEMENT OF THE CASE.

This is an appeal from the Supreme Court of Utah. The case was begun in the First Judicial District at Provo, and it nominally appears in the first page of the record to be a suit in behalf of George W. Taylor et al., vs. The Mammoth Mining Company. The occasion of that title is, that Geo. W. Taylor et al., brought this suit to foreclose a mechanic's lien, and under the statute of Utah all holders of liens, might, could and ought to be made parties defendant. The Salt Lake Foundry and Machine Co. was made such defendant, filed its cross bill under the practice, served it upon its co-defendant the Mammoth Mining Co., claiming to foreclose its lien against the Mammoth Mining Co. That answer in the way of cross-complaint constitutes the first document in the record.

By the pleadings it appears that the plaintiff in cross-complaint, The Salt Lake Foundry & Machine Co., furnished certain iron work for machinery, which went into and on the land and

premises of the defendant. The defendant does not deny that the work was done upon its land, but does deny that it was done by any person authorized to order or render the defendant liable therefor.

The court finds the facts (page 55) substantially in the language of the cross-complaint, and finds the truth of what is stated in it. The real issue between the parties on the trial was whether the persons who were in possession of the land of the defendant, including its mills, refineries and mine and the large and very expensive operation, were so held out to the public as the representatives of the defendant that the defendant was liable for the contracts made by those persons. It was a question of apparent agent, and the evidence was admitted with a view of seeing whether such a case was made out.

BRIEF AND ARGUMENT.

The nature and amount of the items are not disputed.

The defendant alleges that the items were furnished to one Butler Johnstone, or to Bowers and Johnstone, or to somebody else, and not to or upon the credit of the defendant.

The matter in dispute was, whether Johnstone and Bowers were authorized to contract for and in the name of the defendant, or whether they had such apparent authority as to justify the plaintiff in the belief that they had such authority, and that it delivered its goods upon that faith.

It is undisputed that the work toward which the plaintiff furnished material and labor was built upon the company's grounds; that it received whatever benefit, if any, there was derived from the construction thereof; that the title of the completed buildings, being on its grounds, is now in it.

In addition, it was proven that Bowers was the Secretary of the company. That his office was the office of the company. That the proceeds of the work done by him in the way of min-

ing were deposited to the credit of the defendant company. That the pay rolls upon which the men were paid were in the name of the defendant company. That the reports of the assays of ore were in the name of the defendant company. That at times it was called to the attention of each and all the directors that Bowers was carrying on business in the name of the defendant company. That when these particular goods were ordered, or rather when the account was opened and the first order was made, of which the plaintiff furnished a series, that Butler Johnstone was introduced to the bookkeeper of the plaintiff as the superintendent of the Mammoth Mining Company. That in the public prints of Salt Lake City, he had published a notice implying that he was authorized to represent the defendant company. (Ex. 38.) That all over the grounds and premises of the defendant, notices had been put up, announcing the directions of the company, and signed by Butler Johnstone, as one having authority.

Much other proof was introduced tending to show that the work was being conducted apparently for and in the name of the company. Evidence was also introduced on the part of the agents of the plaintiff, that they had no knowledge, information, or means of knowledge or information of any other arrangement or understanding, or that any other person was conducting that work upon the grounds of the company than the defendant itself.

There was evidence introduced by the defendant, in which it was sought to bring home to the president of the plaintiff knowledge that different and other arrangement was had, and of the existence of the contract hereinafter discussed; but the president denied that (see Morris' testimony pages 95-6), so that that was a question of dispute. It was for the trial judge to determine the fact; and this court will not review that determination of fact. Where there is evidence tending to prove the partic-

ular fact, this Court will not review the decision of the trial judge.

On the foregoing state of facts, the trial judge has found, in the language of the complaint: That the goods, wares, merchandise, castings and labor done by the plaintiff was done for the defendant, and at its request. (See 2d, 3d and 4th findings, pp. 87-8.)

The appellant here alleges that the evidence is insufficient to justify these four findings. Upon the principle above stated this court will not review questions of fact where there is evidence tending to support the decision of the lower court. I have already called attention to some evidence which amply justifies this finding. It is not necessary in this case that we should go into a discussion of the weight of the evidence or into a discussion of the effect of the contracts under which the defendant claims this work was being constructed. Here was the apparent authority held out to the world that that work was being done for the defendant. Here was the evidence tending to show that this plaintiff relied upon the apparent authority, had no knowledge of any other arrangement, and parted with its goods on the faith of the defendant. The goods were charged to the defendant, and the account was kept with the defendant. The defendant received the benefit of the transaction; and under such circumstances and these facts, there was sufficient evidence to justify the finding.

86 N. Y., 206.
90 N. Y., 613.
92 N. Y., 601.
69 Penn. St., 429.
12 Wallace, 683.
12 Wheaton, 70.
47 Mich., 348.
5 Cushing, 173.
5 Wallace, 782.

The defendant had the benefit of these goods. It appears by the evidence of all the witnesses that a number of expensive smelters were built for smelting the Mammoth ore upon these premises, and toward which these materials were in part used. That a magnificient refinery was built upon those premises very costly in its structure. The defendant's agents attempt to say that the defendant did not receive any benefit, because these smelters and this refinery were so constructed that they have not been able to use them, and that, although costly and elegantly built, they are not of practical benefit. This is not an answer to the argument that the defendant received the benefit of them. A man receives the benefit of anything when he gets it into his control in such manner that he can use it, and can exercise his dominion over it. That it should prove unprofitable to him is not the test of whether he procures benefit. As well might the guest at the hotel decline to pay for his dinner, which he had eaten and of which he apparently has got the benefit, on the ground that he had already eaten too much, and the dinner did not digest, as this defendant can say that this refinery was improperly constructed.

The plan of this refinery was not made by this plaintiff. This plaintiff is not responsible for its ultimate usefulness. Whether it was such a refinery as could or could not refine ore was a thing with which this plaintiff had nothing to do. The refinery was built upon the defendant's grounds, and such as the defendant saw fit to order. The plaintiff simply furnished labor upon certain parts, and castings for other parts. Now the defendant has had the benefit of those castings, and of that labor, whether the refinery is worth a cent or not.

In addition to the assignment of error, that the evidence is insufficient to justify the finding, the appellant alleges eight specific objections to the admission of evidence, all eight relating to matters of the same nature, to-wit: The admission of isolated circumstances, in which Bowers and Johnstone, or either of them,

were using the name of the company in the business which was being conducted there. The question is whether these are admissable.

The language of Judge Swaine in Bronson's Executor vs. Chappell, in 12 Wallace 683, says: "Agents are special, general or universal. Where written evidence of their appointment is not required, it may be implied from circumstances. These circumstances are the acts of the agent and their recognition, or acquiesence, by the principal. The same considerations fix the category of the agency and the limits of the authority conferred. Where one, without objection, suffers another to do acts which proceed upon the ground of authority from him, or by his conduct adopts and sanctions such acts, after they are done, he will be bound, although no previous authority exist, in all respects as if the requisite powers had been given in the most formal manner. *If he has justified the belief of a third party that the person assuming to be his agent was authorized to do what was done,* it is no answer for him to say that no authority had been given, or that it did not reach so far, and that the third party had acted under a mistaken conclusion. He is estopped to take refuge in such a defense. If a loss is to be borne, the author of the error must bear it. If business has been transacted in certain cases, it is implied that the like business may be transacted in others. The inference to be drawn in, that everything fairly within the scope of the powers exercised in the past may be done in the future, until notice of revocation or disclaimer is brought home to those whose interests are concerned. Under such circumstances the presence or absence of authority in point of fact is immaterial to the rights of third persons whose interests are involved. The seeming and reality are followed by the same consequences. In either case the legal result is the same."

In Bank of United States vs. Dandridge, 12 Wheaton, 70, the court say: "Persons acting publicly as officers of a corporation are presumed rightfully in office. Acts done by the corpor-

ation, which presupposes the existence of other acts, to make them legal and operative, are presumptive proofs of the latter. * * * * * If officers of a corporation openly exercise a power, which presuppose a delegated authority for the purpose and other and corporate acts, show that the corporation must have contemplated the legal existence of such authority and acts. All such officers will be deemed rightful, and the delegated authority will be presumed. If a person acts notoriously as cashier of a bank, and is recognized by the directors and the corporation as being an existing officer, a regular appointment will be presumed; and, his acts will bind the corporation, although no written proof is or can be adduced of his appointment. In short, we think that the acts of artificial persons afford the same presumptions as the acts of natural persons. Each affords presumptions, from acts done, of what must have preceded them as matters of right or matters of duty."

See also:

59 N. Y., 644.
60 N. Y., 96.
5 Cushing, 173.
1st Wall., 240.
47 Mich., 348.

Special objection is made to proving by parol a part of the pay rolls. The pay rolls had been introduced on a former trial, involving the same question between this defendant and other parties. They were well known to the counsel. The defendant was requested to produce them, then and there, by notice in open court. The notice did not take them by surprise; a written notice had already been served, and in pursuance of that written notice they had produced a part of the pay rolls. The inquiry as to the rest of the pay rolls was within the scope of that notice, and it was proper to show that they were in the same form as those produced.

The notice in the *Salt Lake Tribune*, which had been inserted by Butler Johnstone was an open act, one which the defendant company would be presumed to notice and to know. It was an advertisement to the public that he was authorized to speak for the defendant. As such, it was a proper way of proving the agency, the exercise openly of authority which the defendant was bound to take notice of. It was proper to ask Mr. Stringer: "Do you know of any one else raising these works, and if so, who?" He was one of the foremen there; he was one of the parties who were ordering goods. He was one of the persons who was superintending the construction of these works. He had been working under the impression that it was the Mammoth Mining Company. The Mammoth Mining Company was apparently doing the work there. It was proper to inquire if anybody else than that company was doing the work.

This covers the various objections and exceptions made on the part of the appellant. Without discussing at all, and without any necessity in this case to discuss, the effect of the contracts upon which the defendant bases its defense. But we think that, rightly examined and rightly viewed, these contracts show that this defendant would be liable by the terms of them.

It appears that, in truth, when Mr. Bowers was elected director and secretary of the company, the defendant, he had made a contract with the stockholders representing 392,000 out of 400,000 shares; that by the terms of that contract he was to be elected a director, and he was to have the naming of another director, there being five in all. He would represent two-fifths of the company. He was to be Secretary. The directors were appointed, and he was appointed secretary in pursuance of this contract. He was to go into possession. He was to build these works, the smelter and refinery. The first contract was silent as to whether it was to be run in his name or the name of the company. By the terms of that contract, he was to extract ore from the mines, smelt it into matte, sell the matte, and the proceeds of the min-

ing and smelting industry were to be deposited to the credit of the defendant company. All his accounts were to be audited and approved by the directors of the company, other than those appointed by him. They were to allow certain sums to pay those accounts. If he paid to the contractors all the money required by the contract, the stock would become his, and he would be director and stockholder of the Mammoth Mining Company. If he failed to pay for that stock, the stock would remain that of the vendors, and this would still remain in charge of the Mammoth Mining Company. But in either event, whatever was done there was done for the benefit of the company, defendant. It was to have its property enhanced. It was to receive the profits of the mining. It could not have been foreseen whether the mining would have been a financial success or not, or, if successful, to what extent. If fifty millions of money had been extracted from the mine, over and above what was necessary to pay all the bills, that money would not have belonged to Mr. Bowers, but to the corporation, the Mammoth Mining Company. It was to receive the profit of his work; it was to receive the benefit of his work, both in credit in the bank and in the improvement of its property. In no event was there to be any change in the ownership.

It must fall that as this work was done for the benefit of this company, it would be liable whether conducted in its name or otherwise. But Bowers did conduct it in the name of the Mammoth Mining Company. This contract was expressly ratified by a resolution of the board of directors. The company thus became a party to it, and consented that Bowers should have the power to represent the name of the company. The company consented by having Bowers made a director, by having him made a secretary, that this matter should go on, and he should have authority to hold out to the world himself as authorized to represent the company. What can be said of the contract of February, 1882, is equally true of that of November,

1882. That was but a modification of the first one. It was not in their power wholly to make a new one. Bowers had acquired certain rights; he had partly performed a certain contract, and they modified it by a second contract; but the essential elements, to which attention is called above, are still to be found in the new contaact—still the benefit is to be to the corporation, the defendant company. Still their ratification formed the contract. There was no withholding of their ratification. The company, by authorizing this contract, permitted Bowers to use and exercise their corporate powers, and must be held to be estopped to deny that he had the authority to use their corporate name. It was something more than a mere contract for the sale of stock. The purchaser was to have some authority in the company; else what was the need of his being a director and secretary? By giving him this *indicia* authority, the defendant held him out to the world as authorized to contract for it. It cannot now be heard to deny that authority.

It will be seen from the foregoing, that the first eight assignments of error relate merely to the admission of evidence which was cumulative in its character, none of it decisive, which if excluded could make little or no difference with the final adjudication of the case, in short errors which ought not to reverse the judgment, if there were any. They were little *indicix* of the manner in which the business was being done. Sometimes this evidence was not always in favor of the cross-plaintiff; the effect of it was for the court. Take for instance the admission in evidence of the printed notice in the *Tribune*; it is doubtful if that tended to aid the plaintiff, it certainly did the defendant no harm.

The specifications of error as to the insufficiency of the evidence to justify the verdict will not be reviewed here. The real merits of the controversy cannot arise in this discussion. The contracts between the McIntyres and Bowers & Johnstone were admitted and put in evidence at the request of the defendant;

there was no legal construction of the contract, simply a finding of fact at the close. The contracts were received in evidence as bearing on those facts, and a review of those contracts cannot be had here. But while no brief has been filed or served upon the respondent, I wish to call attention to the leading feature of those contracts. By the terms of those contracts the owners of over 390,000 shares of stock out of 400,000 shares, sell that stock. They permit the purchasers of the stock to acquire the use of the franchise of the corporation, to select a part of the Board of Directors, to go into possession, not as the purchasers of the Company but as stockholders of the Company. These persons going in were as truly the Company as those vendors of stock. Strangers dealing with the Company cannot know, or if they do know be bound by the optional arrangements between the holders of the stock. The whole of this Company was practically transferred to Bowers and Johnstone. The power to represent it must necessarily go with it. McIntyre could not retain the benefits and not be bound by the conduct and acts of those whom they had thus permitted to buy stock on option.

We submit that this judgment should be confirmed.

Respectfully submitted,

BROWN & HENDERSON.

Arthur Brown.